Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, Appellant,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove*. } No. 24.

THE OFFICERS AND ENLISTED MEN OF THE U. S. S. *New York*, and Other Appellants,
v.
THE OFFICERS AND CREW OF THE U. S. S. *Mangrove*. } No. 34.

BRIEF OF COUNSEL FOR APPELLEE.

Statement of Case.

The District Court for the Southern District of Florida adjudged that the U. S. S. *Mangrove* was the sole capturing vessel of the *Panama* and cargo; that the prize was of superior or equal force; that no other vessel was within signal distance, or entitled to share; and that the total net proceeds were decreed to the officers and crew of the U. S. S. *Mangrove*. (Rec. p. 59.)

Opinion of the court is in Rec. pp. 53–59. Appeals were taken to this court by the United States (Rec. p. 60) and by the officers and crew of the U. S. S. *Wilmington*, *New York* and *Indiana* (Rec. p. 63).

NOTE.—References to questions put to witnesses where numbered give the number and page; where not numbered reference is to the page. Pages of the Additional Record are referred to as Add. Rec.

On motion of appellants in this court leave was granted to take further testimony.

Questions Involved.

Section 4632 R. S. provides:

"All vessels of the navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid, if required, shall share in the prize," etc.

Section 4630 R. S. provides:

"The net proceeds of all property condemned as prize, shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one-half shall be decreed to the United States and the other half to the captors."

The *Mangrove* made the capture. The vessel captured was armed and of superior force to the *Mangrove*. (Q. 31, p. 9; Q. 31, p. 13; Q. 31, pp. 16 and 17, Rec.; Q. 14, p. 158; Q. 7, p. 171; QQ. 73–79, pp. 143–144; X-QQ. 3–9, pp. 144, 145; X-QQ. 1–5, pp. 146 and 147, Add. Rec.)

Relative Force.

Were the *Wilmington*, *New York*, *and Indiana* entitled to share in the prize, they should not be counted in estimating relative force.

Section 4630 provides:

"The net proceeds of all property condemned as prize, shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one-half shall be decreed to the United States and the other half to the captors."

The comparison here made is between the prize and the vessel making the capture.

Section 4632 in relation to the vessels entitled to share makes this provision:

"All vessels of the Navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid, if required, shall share in the prize, and in case of vessels not in the Navy, none shall be entitled to share except the vessel or vessels making the capture; in which term shall be included vessels present at and rendering actual assistance in the capture."

This section recognizes that there are two classes of vessels which share in the prize—those "making the capture" and those "within signal distance." It also recognizes that vessels "making the capture" are only those "present at and rendering actual assistance."

The comparison under Section 4630 is between those "making the capture" and the prize, and vessels within signal distance not "making the capture" are not to be considered.

The *Mangrove*, it is admitted, in this case made the capture, and therefore under Section 4630 is the only vessel entitled to be considered in determining relative force, even if the other vessels within signal distance, under Section 4632, would have to be omitted in making the comparison required by Section 4630, and the entire proceeds be awarded the captors and no share to the United States because the *Panama*, the prize, was of superior force to the vessel making the capture, the *Mangrove*.

Judicial precedent for this view is found in *The Atlanta*, 2 Sprague, 251; 2 Fed. Cas. 116.

The *Atlanta* was captured by the United States monitors *Weehawken* and *Nahant*. The capture was made by these

two vessels although actual shots were fired only by the first. The *Nahant* was immediately on the scene of battle and within a few hundred yards of the prize, ready to fire. In company with these vessels was the steamer *Cimmerone*, which, not being armored, was left within signal distance but entirely out of the battle.

In discussing the rights of this vessel the court says:

"It is admitted by the officers of both monitors, that the gunboat *Cimmerone* was all the while within signal distance, and acting under the orders of the senior officer, and consequently entitled to participate in the distribution, as being "within signal distance of the vessel or vessels making the prize." The only question as to her is, whether she is to be counted in as part of the capturing force; that is, whether she is to be deemed one of the vessels "making the capture," within the meaning of the statute, when we are comparing the force of the captors with that of the prize, for the purpose of determining whether the proceeds belong wholly to the captors or are to be divided between them and the Government.

* * * * * * *

"Our statutes, as I held in *The Cherokee* (*supra*) recognized two classes, vessels making the capture and vessels which do not make the capture, but are within signal distance of those that do. From this the inference is, that the mere fact of being within signal distance, able and ready to give aid, if required, does not bring a vessel into the first class. If it did, we should confound the distinction made by the statute, and treat as actual captors all who were within signal distance of actual captors. Another result would follow, that all vessels within signal distance of this second class of vessels would share in the distribution, though not within signal distance of the first class, because they would be within signal distance of some of the vessels which we should have held to be vessels making the capture. I have no difficulty, therefore, in deciding that I must exclude the *Cimmerone*, in determining the relative force of the captors and the prize. In like manner, I exclude the gun boats of the rebels

which were within signal distance of the *Atlanta*, but kept aloof."

The same judge had previously in his very elaborate opinion in the case of *The Cherokee*, 2 Sprague, 235; 5 Fed. Cas. 550, recognized this separation of vessel entitled to share in the distribution into two classes in the following terms:

"By our statutes, there are two classes of ships, and two classes only, which are to participate in the prize. The first are those who make the capture, or, in other words, those making the prize. The second class are those within signal distance of one of the first class."

The case of the *Atlanta* was subsequently taken to the Supreme Court, 3 Wall. 425, on the question whether the *Nahant* should be regarded as one of the capturing vessels. It was decided that since the *Nahant* had been directly present, almost as near, had been fired upon by the *Atlanta* and thus created a diversion from the *Weehawken*, and was ready to fire, had the fire of the *Weehawken* not been unexpectedly decisive, the *Nahant* must be included with the *Weehawken* in the comparison of the forces engaged in the conflict. The decision below was therefore affirmed. This is in nowise a reversal of the decree of the court below or a condemnation of its opinion in holding that the *Cimmerone*, while within signal distance and to be counted in the distribution, was not to be included as one of the vessels making the capture.

The point made is based upon the words of the statute itself. For the purpose of computing relative force the vessels making the capture are alone to be considered, and the *Wilmington*, *New York* and *Indiana* must be excluded under Section 4630 in a comparison of relative force without regard to what construction the court may

adopt as to the right of these vessels to share in the distribution under Section 4632.

The *Mangrove* is entitled to the entire net proceeds, unless the other naval vessels claiming were within signal distance, under such circumstances and in such condition as to be able to render effective aid, if required.

Not Capable of Rendering Effective Aid.

No testimony is offered to show that the vessels claiming to have been in signal distance were under such circumstances and in such condition as to be able to render effective aid to the *Mangrove*, if required, or as to *the distance at which they could with their guns render effective aid.*

Testimony of the captain of the *Indiana*, for appellants, that he considered when the *Indiana* fired at 6.45 that there was danger of the *Panama* eluding the *Indiana* and escaping (Add. Rec. pp. 70, 71) certainly raises serious doubt as to whether at the time of the capture, 35 to 40 minutes before, the *Indiana* was close enough to have rendered effective aid. He is so emphatic as to say: "I have no doubt in my mind that the prize would have been lost if she had once passed us on that occasion" (Add. Rec. p. 71). This from the chief witness for appellants.

Lieutenant Dayton, a witness for the appellee, is very positive the *Indiana's* guns could not have been effective, and gives his reasons very clearly. (Add. Rec. QQ. 80, 81, p. 144.) The testimony of witnesses on the *Mangrove* and of totally disinterested witnesses upon the *Panama*, of all they could see at the time of the capture, and the testimony showing the vessels to have been at that time about 14 knots apart, all hereinafter referred to, prove the *Indiana* was not under circumstances and in condition to render effective aid if required.

When the *Panama* and *Mangrove* were approaching the

Indiana, the *Mangrove* on the port side, Captain Waller, of the *Indiana*, fired a shot at a range of 4,500 yards, some 2½ knots, and it struck the water between the two ships, and ricocheted towards the *Mangrove* (Add. Rec. QQ. 25, 26, p. 268). It was intended to go across the bow of the *Panama*. This clearly shows that when the *Mangrove* and the *Panama* were close together, at the time of or just before the capture, any attempt by the *Indiana* to aid the *Mangrove* by firing at the *Panama*, even if the two vessels at that time were not more than six or seven miles off, would have been as dangerous to the American vessel as to the Spanish ship. The evidence shows that when the *Mangrove* summoned the *Panama* to surrender, the *Indiana* was considerably more than 14 knots away.

Wilmington.—Discussion of the claim of the *Wilmington* will be found in the opinion of the court below (p. 58). No additional testimony for this vessel has been taken since. All the testimony bearing on the claim of this vessel is to be found pp. 46–48 inclusive of the Record.

New York.—Discussion of the claim of the *New York* by the court below will be found pp. 58, 59 Rec.

There is no additional evidence warranting change from the view expressed by the court below. The captain of the *New York* states his vessel was not within signal distance. (Add. Rec. QQ. 40–41, p. 100; QQ. 21–23, p. 99). For testimony concerning the whereabouts of the *New York* at the time of the capture, see Rec. Q. 10, p. 40; Q. 4, p. 41; Q. 4, p. 43; Q. 4, p. 51; Q. 9, p. 42; Add. Rec. Q. 215, p. 26. Not in sight from *Indiana*, 2, 4, 5 and 6, p. 212; 2, p. 230; 2, p. 236; 2, p. 243; 5, p. 249; 4–6, p. 256—all in Add. Rec.

This narrows inquiry down to the *Indiana*.

Appellants, unwilling to risk the decision of this court upon the facts as presented by the original record, pro-

cured an order for taking additional evidence. The testimony is now all in, and our main propositions are—

1. The burden is upon the appellants, first, *because they are the plaintiffs*, and secondly, *because the decision of the court below is against them on the facts.* This court ought not to reverse upon a mere difference of opinion as to the weight and effect of conflicting testimony. To warrant a reversal *it must be clear that the* lower courts have committed an error and that a wrong has been done to the appellant. (*Lockwood* v. *The Grace Girdner*, 7 Wall. 196; L. L. 19, 113, and cases there cited.)

2. Judge Locke, Rec. pp. 3–6, cited, with approval, a decision from I Lowell, that "from five to six miles was the average distance at which flag signals could be read," stating also that the case cited showed that *one witness* had testified "eight miles" as the utmost limit of vision in reading flag signals.

3. Appellants have failed to show the incorrectness of this decision.

4. Judge Locke, in his opinion, said:

"The testimony of the several witnesses in respect to the distance of the vessels apart is not the result of actual measurement, but are conjectural, and matters of opinion only, and must be so considered, particularly where there is such a conflict of testimony, and it is more satisfactorily shown by their movements (the ships) than it can be by the conflicting opinions of the witnesses." (Rec. p. 56.)

And deciding that the *Mangrove* started at "a little before 5 o'clock" and was running away from the *Indiana* at the rate of eight miles, and that the *Indiana* starting southwardly at 5.10 was running at the rate of 10 knots until 6.00, he concluded they were at least 12 or 15 knots apart at the time of the capture at 6.07.

5. New evidence is mainly important as it bears upon the two points, the time the vessels were running away from each other, and their speed. One witness, Admiral Taylor, minimizes the time during which the *Indiana* was running, testifying that the *Indiana* stopped for some minutes. We overcome this by his log, showing that the *Indiana* never stopped at all—only slowed at 5.48, and by two of appellee's witnesses we corroborate the log.

6. It was open to appellants to show conclusively by the log of the *Indiana* that her speed was less than ten knots. They failed to produce this primary evidence, and resorted to the secondary evidence of witnesses whose memories might tally with their theory.

7. We produce, under the order for additional testimony, the steam-log of the *Indiana*, showing that she made not only greater speed on other occasions about that time, but also that actually in that chase she made three-quarters of a knot more than the speed on which Judge Locke based his estimate.

8. The *Indiana* appellants produce under order for additional testimony, three officers, Captain Taylor, Colonel Waller, and their chaplain—a notable expert on speed and distances—whose memories at a distance of three years minimizes the speed of their ship as given by its log, from which alone they could have derived their knowledge.

9. *Per contra*, Captain Dawson and Lieutenant Decker, of the *Indiana*, who were examined *in preparatorio* shortly after the capture, and every other officer and man, not attached to the *Indiana*, examined on this point, from start to finish—including the captain of the flagship, one of appellants' witnesses—agree with the log of the *Indiana*, or give her as great or greater speed than Judge Locke estimated upon.

10. As to the enlisted men whose memories are counted

on to minimize the speed shown by the *Indiana's* log, we will comment on their evidence and ours on the same point hereafter.

11. The *Mangrove's* signal flags were 3 x 4, one-seventh a surface of the usual signal flags, 11 x 8. Appellants have testimony showing from experience the distance at which the usual flags can be read. The burden was upon them to show by similar testimony, how far boat-flags like the *Mangrove's* could be read. They have no testimony whatever on that point, and for this reason also their case must fail.

12. We make an estimate similar to that of Judge Locke, based upon the distances run by the *Mangrove* and the *Panama* away from each other, taking in all the new evidence, and this estimate shows that at the time of the capture the *Indiana* was 13½ knots away. Judge Locke's estimate was "12 or 15 miles at the least."

13. We further strengthen the judge's conclusion by another estimate based upon the distances run by the *Indiana* and the *Mangrove* in going towards each other after the capture till they met. This estimate based on the testimony of the logs and of the gun fired by the *Indiana* at the Spanish flag as the ships approached each other shows 13.35 knots.

Judge Locke reconciled the testimony by concluding that those on the *Indiana*, which was the taller ship, could see the *Mangrove*, while those on the latter, it being lower, could not see the former.

So far as reconciliation is possible, this is the only theory. Failures in memory after 3 years must account for the rest. Much of the testimony, especially from the deck, is irreconcilable with the facts. We certainly do not intend to assail the veracity of the officers of the *Indiana*, most of whom we personally know. Appellants' most important witness, Admiral Taylor, has, and de-

serves to have, as do the others, the very highest character. All the errors of memory the Admiral has fallen into we can, fortunately, and do, account for naturally. We comment more on his errors than those of others because he is their most important witness.

The Admiral says he stopped the *Indiana* while signalling the *New York*. The *Indiana's* log and two witnesses on the *New York* show he is mistaken. *He had in mind* that he gave an order which stopped the high speed the ship was making, and he did give an order somewhat to that effect, but the log (p. 202, Add. Rec.) shows the order was only to slow and not to stop and that that was at 5.48.

Again, Admiral Taylor says: "When the *Indiana* started toward the *Mangrove* and the *Panama* at 6.00, she went leisurely because not in a hurry"; and that speed was quickened when the *Mangrove* fired. *He had in mind* the quickening order, and had forgotten that, as the log shows, the first order was for "full speed to make 85 turns" and that it must have been after the gun fire that the order came for "all possible speed."

So the Admiral's giving the speed capacity of the *Indiana* at much less than her log shows, is accounted for by recalling her foul bottom, his continued anxiety lest she should break down, her slow speed compared with her consorts. Her habitual slow speed had impressed itself upon his memory.

As for opinions of distances on water, nobody can be held responsible for them. As this record shows, if any two or more witnesses agree it is accidental.

So of the *Indiana's* chaplain, who testified that certain men on the *Mangrove* said that they saw the *Indiana*, or that the *Indiana* was in sight, when they expressly denied it. Doubtless the chaplain was never before in a chase, and in his excited mood it was easy for him to mistake an

expression like "There is the *Indiana's* smoke," for "There is the *Indiana*," etc.

In the outset we call attention to the fact that the *Indiana* originally claimed as captor.

Following are the circumstances out of which that claim arose: The capture was made at 6.07 P. M. The *Mangrove* with her prize, the *Panama*, Ensign Dayton on board as prizemaster, was going south in search of the *Indiana* to get from her men (which the *Mangrove* could not spare) to complete the prize crew. Under an order of the Navy Department prizes were to fly their flags until an order of condemnation. (Bottom p. 70, Taylor; 30–33, p. 109, Everett; 19, p. 125, Palmer; 46, 47, p. 141, Dayton, all Add. Rec.) Captain Everett had allowed the flag of the prize to continue to fly at the topmast, instead of being lowered to half-mast, The *Indiana, which had turned and was now rapidly coming up, when she came close enough to see this flag on the coming vessel, fired, and the flag was at once lowered.* Captain Taylor's recollection, when asked three and a half years afterwards, why he fired that shot, is as follows:

"I fired it, for my own part, because I feared she would escape from the *Mangrove*. Officers who were on the bridge with me spoke of her colors not being down. This was, I remember, an added reason for firing a gun, but primarily I gave an order to fire because I feared that the *Mangrove* had not completed the capture, or, having completed it, the vessel might still escape her." Bottom of p. 61, Add Rec.

Captain Dawson, signal officer on the *Indiana*, and on the bridge, evidently saw no indications that the prize was about to escape (Q. 347, p. 40, Add. Rec.)—

"Q. Well, why then, did you fire across the bow of the *Panama* later on?

"A. Because we saw the Spanish colors flying."

The following testimony is strong to show that Captain Taylor had been so far away *that he did not really know the situation* when he fired:

Captain Everett of the *Mangrove* said: " * * * I hailed the *Indiana*, and said something to this effect: 'Captain Taylor, that is my prize,' to which he replied: 'I congratulate you; *what is she?*'" (Near top of p. 106, Add. Rec. See also Cosgrove's testimony, Q. 7, near bottom p. 172 and top p. 173.)

When Captain Taylor was asked about this, the answers and questions were as follows:

"Q. Admiral, after you fired this shot across the bow of the *Panama*, are you certain that you hailed the *Mangrove* to come alongside, or did Captain Everett steam up of his own accord and call out to you?

A. I do not remember which passed the first hail.

Q. Do you remember whether you asked him what ship it was that he had?

A. *I do not remember.* I remember one thing in the conversation was 'I congratulate you,' or 'We congratulate you.'" (Near top p. 72, Add Rec.)

When asked whether there were any suspicious circumstances at the time of firing he enumerates, as follows: "One, that she was proceeding on her way with the *Mangrove* some *distance astern* when the *Panama* could see him plainly, and both she and the *Mangrove*—they were coming right toward him"; second, that her colors were still flying," which ought to have convinced him that she was making no attempt to deceive him, and then he adds: "*she had not given the token of surrender* which is customary in all actions in maritime affairs." Still adhering to this same idea he further justifies it, top p. 76, Add. Rec.: "I am confident from what I have learned that it (the Spanish flag) had not been hauled down.

When the *Indiana's* gun was fired the Spanish colors

were hauled down and a prize crew put on board, to serve under Ensign Dayton, the *Mangrove's* prizemaster. *This the Indiana chose to treat as a capture.* In her steam-log is an entry made the same day (p. 202, Add. Rec.) showing how the *Indiana's* people looked upon their exploit: Chased *and captured Panama*, bound into Havana." Upon this idea the first claim for prize was made out the next day at sea, April 24, 1898, and filed in court May 11, 1898.

Under § 4616 of the Revised Statutes, the commanding officer is required "to make out a written statement of his claim, *with the grounds on which it is founded*, the principal facts tending to show what vessels made the capture and what vessels were within *signal distance* of those making the capture, with reasonable particularity as to the times, *distances* and characters of signals made, seen or answered," etc.

Then § 4632 provides that "all vessels of the Navy within signal distance," etc. shall share in the prize. The *Indiana's* claim was as follows:

155. U. S. S. *Indiana*, 1st Rate,
At Sea, April 26th, 1898.

SIR: 1. In accordance with Sec. 4616 and 4632, R. S., I herewith present the claim of myself, officers, and crew for a share in prize money awarded under law for the capture of the Spanish steamer *Panama*, off Havana, Cuba, April 25, 1898.

2. The following is an extract of the official log: 4 to 8 P. M. At 4.30 P. M. made signal to *Mangrove*. She came within hail and was given orders to proceed to Key West after receiving mail. 5 P. M. mustered crew at quarters. At 5.10 P. M. went ahead at full speed to communicate with "F." About 5.15 sighted strange barkentine-rigged to eastward. Steamer sighted later proved to be a barkentine-rigged steamer with long black stack and straight bow. At 6.00 headed for her. The *Mangrove* was seen to head for the steamer, and at about 6.10 the

steamer stopped. Later the *Mangrove* and steamer, whose colors were made out to be Spanish, steamed slowly to the westward. At 6.45 fired shot across bow of steamer, and Spanish colors were hauled down at 6.48. Sent officer and prize crew of the following men [naming them]:

The prize proved to be the *Panama*, of Barcelona, 5 days out from New York, with 29 passengers and general cargo. *Panama* with crew stood to the westward to communicate with "F." Signals as follows:

5.40—"I" to "F." Will proceed on service at once.
5.45—"F" to "I." What is character of strange vessel?
5.50—"I" to "F." Merchant vessel.
5.52—"F" to "I." What colors does strange vessel carry?
5.55—"I" to "F." Can not see.
6. P. M.—"I" to "F." Strange vessel changed course to eastward.
6.45—"I" to *Mangrove*.—Come within hail. Rec. pp. 35, 36.

Nowhere in this claim is it stated that the *Mangrove* had anything whatever to do with the capture, or that any prizemaster was aboard. It is clear that the *Mangrove* was only mentioned in accordance with the explicit directions in § 4616, that the claim should show "what vessels were within signal distance of those making the capture." It is true that the claim purported to be made under §§ 4616 and 4632, but § 4632, it would seem, is only cited because the *Mangrove* was in signal distance and entitled to share under § 4632, the *Indiana* setting forth no grounds whatever for any claim for itself under that section. The claim also set forth, under § 4616, a record of "signals made, seen and answered," but it did not say anything about "distances," as required by that section, the claimant doubtless supposing that distances were to be set forth by the *Mangrove*, the *Indiana* having nothing to do with them, it having made the capture by compell-

ing the flag to be hauled down, putting on a prize crew, etc. *This claim was signed by Benton H. Decker, Lieutenant, U. S. Navy, and H. C. Taylor, Captain Commanding.* The claim that the *Indiana* was the captor under the circumstances shown in the evidence is simply playing at *opera bouffe.*

Signal Distance an Afterthought.

On May 3, 8 days after the first claim was filed, the second claim was made out and this new claim was filed in court May 19, signed by these same officers, in which was added to the statement first filed an assertion that the *Indiana* was "within signal distance and able to render effective aid," etc. To sustain this new claim the proposition of the *Indiana* is, that although (see log filed as basis of claims, Rec. pp. 35, 36) she sighted the *Panama* at 5.15 and remained in sight of her—both vessels travelling nearly in the same direction—until 6 o'clock, three-quarters of an hour, during which period the *Indiana* was not close enough to see anything that would justify her in turning about in pursuit; and although the flagship from 5.45 had been making inquiries as to the character of the strange vessel whose colors the man up aloft in the towers of the *Indiana* could not make out, the *Indiana* was nevertheless within signal distance all the time of the little *Mangrove,* which was continually going away from her; and this not only at the time when the flagship was inquiring about the colors of the strange vessel, at 5.52, but also at the time of the capture, about or a little after 6 o'clock.

The appellant's proposition further is, that it was "easier" for the *Indiana* to obtain the information the flagship wanted by turning about and going ahead at "full speed and then at all possible speed" for 45 minutes, say 7¾ miles, to see for itself what were the colors of the

stranger, than it would have been to obtain that information by signalling to the *Mangrove*, signalling being ordinarily done, as the log of the *Indiana* shows *supra*, in from 2 to 5 minutes. Nobody denies that it would have been the duty of the *Mangrove* to answer at once signals asking information for the flagship, nor that it was the duty of the *Indiana* to obtain that information. It is the testimony of the captain of the *Indiana* himself (Add. Rec. p. 69) that going with his ship to investigate, instead of signalling the *Mangrove* he was resorting to the "easiest" method of obtaining the information. So this court is asked to believe that the signal distance spoken of in the statutes covers cases where, as will appear from his own testimony, a prudent officer at the time of the transaction would not rely on, or even make any attempt at signalling, which he might have done even while steaming away, but would, instead, prefer to steam his ship at full speed for three-quarters of an hour, in order to find out the color of the stranger's flag.

Admiral Taylor (see answers to questions on p. 69 Add. Rec.) when asked whether signalling the *Mangrove* would not have been the easiest way to ascertain the color of the stranger said, "*No, it would have been longer, for at great distances it takes some time,*" and "*Signalling at this distance is always slow*" (light travels from one flag to another at the rate of *196,000 miles a second*); "it takes time," he goes on to say, "to make out signals at that distance when you come *near the limit, and twilight was approaching.*" There, in the distance, was the *Mangrove* approaching the *Panama* and, looking at her and at the sun, which at 5.52—when he signalled "can not see" the colors of the stranger—was half an hour and three minutes high (see agreed testimony, p. 203, Add. Rec.). Admiral Taylor's decision was at that time, and so his memory is now, that the easiest way was to go and see; instead of trying, when the sun was

so low, to signal the *Mangrove*, because she was so near the limit.

"It is true," he goes on to say, answering still the same question, "and further, there was no doubt in my mind that the flagship regarded the *Mangrove* as not of sufficient force to make sure of the prize"; but this further reason for going, deduced from the simple inquiry of the flagship as to the stranger's colors, does not in any measure affect the straightforward "No" with which the commander of the *Indiana* answered the question on p. 69, Add. Rec. whether it would not have been easier, etc. Signals about the strange vessel were passing between the three vessels that could signal. (See log of *Indiana*, *supra*.) First the *Wilmington* to the *New York;* then the *New York* to the *Indiana;* then the *Indiana* and *New York* to each other, back and forth; but the *Indiana* did not signal to the *Mangrove* and the *New York* did not suggest it, because, and it could be only because, at that time it was deemed impracticable.

Admiral Taylor's idea seems to be that the statute covers cases where ships are within signal distance theoretically, and his explanation seems to proceed on the further idea that this case was "so near the limit" that signalling was not practicable.

Three Classes of Testimony Relied On.

Counsel have offered evidence of three different classes to show that if signals had been made by the *Mangrove* at or about the time of the capture, the *Indiana* could have read them. These are:

1. What witnesses saw—the inference being that if they saw the things they have testified to they could also have seen signal flags from the *Mangrove*.

The conflict in the testimony of this class will be discussed generally hereafter. Here it is well to bear in

mind that the *Mangrove* was not in flag signal distance, unless the flag signals with which she was equipped could have been read. The weight of the testimony is, that 5 miles, or, at the very outside, 6, is the utmost distance at which signal flags ordinarily in use can be read. Captain Dawson, the *Indiana's* signal officer, testifies in answer to Q. 51, p. 9, Add. Rec. that the largest-sized flag in common use is 8 x 10; and in answer to Q. 52, p. 9, Add. Rec., that the largest size is 10 x 14 or 13. Ensign Palmer, Q. 48, p. 129, Add. Rec. estimates the usual signal flag at 8 x 11, and the boat flags, the only signals with which the *Mangrove* was equipped, he said were 3 x 4 (Q. 49, p. 129, Add. Rec.). Now if we take the average between these witnesses as the size of the largest signal flags, 12 x 10 equals 120 sq. ft. of surface; whereas the *Mangrove's* flags, 3 x 4, contain only 12 sq. ft. of surface—just $\frac{1}{10}$. If we estimate the usual flags at 8 x 10, or 80 sq. ft. of surface, this is just $6\frac{2}{3}$ times as many sqare feet.

Then again. The Spanish flag, *which the Indiana could not see*, as Ensign Dayton says, QQ. 34–39, p. 140, Add. Rec. *was 12 feet long, or three times the length of the Mangrove's signal flags*, and it must have been much wider.

Nowhere in all the multitudinous evidence that has been offered in this case is there any testimony to show that boat flags, such as the Navy Department had furnished to the *Mangrove* and she was compelled to rely on, have ever been read at 5 miles, or even 4 or 3.

2. The second class of evidence offered by appellants consists of opinions of the distance the several ships were apart at given periods. These opinions vary distressingly, but not unnaturally. One of the sailors prefaced his answer to a question of this character by saying "*Water is deceiving.*" Of course it is. There are no objects on the dead level of the water by which to measure. Captain Dawson, signal officer of the *Indiana*, when asked

(Q. 230, p. 27, Add. Rec.) whether he had not stated that the *Panama* was 6 or 7 miles off when sighted, answered: "I stated, if I remember rightly, that she appeared to be within 6 or 7 miles when sighted. I had no means of making an estimate except making a guess."

We have of course introduced in rebuttal much evidence showing opinions of distances, and our testimony on this point is quite as reliable as that of the appellant. We base our argument, however, at this point *not on opinions, which are mere guesses, but upon facts about which there can be no dispute.* Whether our inferences are warranted by our basis of facts the court will decide.

3. Some evidence has been introduced as to gun signalling, which is discussed hereafter. The testimony shows that while gun signalling is provided for in the Regulations, it is not in practical use. No witness has testified to any case in which such signalling, in the day time and in clear weather, has ever been resorted to in the navy.

The Testimony of the Logs.

We rely now upon "the official log" of the *Indiana*, pp. 35, 36 Rec.; the "steam-log" of the *Indiana* as certified to on top of page 202, Add. Rec. and upon other extracts from logs of the *Indiana* contained in the testimony of Lieutenant Dyson, and on pp. 198–202, Add. Rec. inclusive, together with the expert testimony of that officer explaining the significance of the extracts from the logs on pp. 201, 202, Add. Rec.

The parts of these several logs we rely on as technically and exactly correct are the statements which were recorded instantaneously, such as the precise periods of signalling, and entries made in the "steam-logs" showing the minute at which orders were given and the character of those orders, as well as also upon all the extracts from the log of the *Indiana*, showing speed at different dates. There

can be no question as to the correctness of any of these. As to the "smooth log," however, filed by the officers of the *Indiana*, as showing the grounds, and the only grounds, of their original claim, the case stands differently. The presumption is in favor of the correctness of this log, but errors may creep in here, *because this log is the generalization made up at the end of a day, or of a period of hours.* There error may creep in, especially if the makers of the log rely to any extent upon memory, as the evidence shows here they must have done, instead of consulting, as they should have done, at every step the original record.

Comments on the "Smooth Log" of the *Indiana* (pp. 351-6).

First Comment.—"At *5.10* P. M. went ahead full speed to communicate with F." Note the discrepancy between this and the *Indiana's* steam-log, p. 202, Add. Rec. introduced by us, which says: "Ahead full speed *5.05*." This difference *is sufficient to cover almost a mile by the Indiana.* See speed discussion *infra.*

Second Comment.—The signal of the *Indiana* to the *New York*, p. 36, was: "6 P. M. 'I' to 'F.' Strange vessel changed course to eastward." The *Indiana* undoubtedly saw at that time a movement of the strange vessel, a turning of her nose to the eastward, which warranted the signal; but the *Panama* never changed her course to the eastward for the purpose of continuing it. This signal can only mean that when the prize was ordered to stop and that order emphasized by the second and third shots from the *Mangrove*, the *Panama* heaved to. The vessel, if we believe her captain, Quevedo, (Rec. Q. 3, p. 13,) had commenced to slow down at the first shot, although Captain Everett, if we believe him, had not—very naturally, as the *Panama* was probably going straight

on—perceived it, wherefore he fired two after shots, whereat, in order to stop suddenly, the *Panama* "hove to," in the language of several of the sailors, which means that she turned her nose eastward in the water and her side to the *Indiana*, that she might stop as promptly as possible.

As to our proof, Ramon Burgas, a witness on the *Panama*, says, in answer to interrogatory 29, p. 9, Rec.: "The ship was steering her course toward Havana when she was captured. * * * Her course was always directed toward Havana."

Captain Quevedo, in answer to the same interrogatory, 29, p. 16, Rec. says: "We were steering our course toward Havana when we were captured. * * * *Our course was always directed for Havana.*" So say all the witnesses who, on both the *Indiana* and the *Mangrove*, speak on that point, including the two witnesses, Chaplain Cassard and Yeoman Murray, who belonged to the *Indiana* and who testify for her, they being at the time on the *Mangrove*, having shipped for Key West. Comparing the statement contained in the flag signals, "strange vessel changed course to eastward," with another statement lower down in this "smooth log," viz: the next statement about the movement of the prize—"and at about 6.10 the steamer stopped," we should have, if both statements be correct, the *Panama* running east, after changing her course to the eastward for 10 minutes, during which time, being a 12-knot ship, she would have steamed, allowing for time within which to slow down and stop, at least 1½ knots out of her course. The *statement, therefore, "Strange vessel changed course to eastward," signalled at 6 p. m., can only be interpreted to mean that it was at that time that the steamer "hove to" in order to surrender*, and the signal was sent immediately to the flagship as soon as the "strange vessel" was seen so to turn.

This construction of the meaning of the movement recorded by the signal at 6 is confirmed by the testimony of Captain Chadwick, appellant's witness (Add. Rec. Q. 13, p. 98): "The *Panama* was first heading to the westward and then she turned around and headed to the eastward" and (Q. 16) she had proceeded "only a short distance" before the *Mangrove* came alongside of her. Captain Chadwick was watching the result from the *New York* with the only long-distance telescope in the fleet. Compare Ensign Dayton, Add. Rec. p. 137, Q. 6. Three shots were fired and the vessel "heaved to," which means changed her course and stopped (Q. 7). "After the *Panama* had stopped dead in the water we came close to her on her starboard side, our port side toward the *Panama*, both heading in the same direction," which is exactly what would have been done if Captain Chadwick was right in saying that only a short time after the *Panama* changed her course to the eastward the *Mangrove*, which was coming from the southwest, ran alongside of her.

This tallies with all the evidence as to the time of the capture. Gaspar Thompson, supercargo on the *Panama*, testifies, interrogatory 3, p. 10, Rec.: "The ship was taken * * * at about 15 minutes to 6 o'clock P. M." Captain Quevedo, of the *Panama*, testifies, p. 13, Rec., interrogatory 3: "At 5.50 the first shot was fired by the *Mangrove*. After the first shot I stopped the ship." Both these witnesses evidently consider the capture as having taken place at the first shot, the ship having then decided to yield. Even on this supposition, their watches were a little slow. Compare with Captain Everett's testimony, Q. 4, p. 105, Add. Rec. He says he "fired a starboard 6-pounder, rapid-fire gun, across her bows to bring her to. She did not stop, and I rounded up and fired two shots from the port 6-pounder. At the third shot she

stopped," etc. It is evident, if we reconcile the testimony of these witnesses, that Captain Quevedo gave his order to stop after the first shot, but as it did not seem to Captain Everett that the stop which, of course, it would take her some time to make, was prompt enough if she continued straight ahead—he fired the other two shots, whereupon she must have stopped by turning her nose, as ships must always do if they mean to stop promptly and have plenty of deep water in which to arrest their onward course by turning.

Now take the testimony of a number of witnesses, which is not questioned, that the capture was completed by the putting of Ensign Dayton on board the *Panama* at 6.07, and we not only account for this signalling of the *Indiana* made at 6 o'clock, but the corroboration helps us to fix the time of the capture. The vessels were, as all the witnesses say, close together. Captain Everett says, Q. 4, p. 105, Add. Rec. between 100 to 200 yards apart. A boat could certainly be lowered into the water within from one to two minutes. Two men can pull a boat faster than the brisk walk of a man, which would cover a mile in twenty minutes, or 100 yards in a minute and a quarter; so that two minutes would have carried Ensign Dayton to the *Panama*, and within three minutes he could mount the bridge, demand and accept the surrender.

The effort made to prove that a longer time would have been necessary, by testifying that regulations require a boarding officer to examine papers, etc., etc., has no application to a vessel bearing an enemy's flag in time of war. Thus this entry of the signal at 6, "Strange vessel changed course to eastward" is founded on a fact, viz., that at 6 P. M. the *Indiana* did see the *Panama* change direction to the eastward, and must have signalled it immediately.

THIRD COMMENT.—Note in the "smooth log" the

statement: "At 6, headed for her," followed immediately by "the *Mangrove* was seen to head for the steamer." From the collocation of these sentences the idea is conveyed—this smooth log appearing to be a consecutive statement—that after the *Indiana* had headed for the steamer the *Mangrove* was seen to head for her. Captain Quevedo, Q. 3, p. 13, Rec. says *Mangrove* "steered towards us at 5.40." Yeoman Murray, a witness for the *Indiana*, Q. 3, p. 43, Rec. says, "about half or three-quarters of an hour after leaving the *Indiana* the *Mangrove* sighted the prize" and "altered her course to intercept her."

Chaplain Cassard, the other *Indiana* witness on board the *Mangrove*, says, p. 38, Rec. answering same interrogatory 3: "I left the *Indiana* and joined the *Mangrove*. A short while later, about 20 minutes, a strange steamer was sighted. The *Mangrove* and the steamer were approaching each other, the first headed for Key West and the steamer towards Havana. The *Mangrove* altered her course slightly to intercept the steamer."

There is still another witness and he occupies an equivocal position, but his testimony we will quote because it throws a flood of unintentional light on this particular part of the case. The witness Munson, whose evidence appears on pp. 190–197, Add. Rec. we were by some means induced to call to testify for the *Mangrove*, although he had been on the *Indiana* at the time of the capture as pilot. The court will judge from his evidence whether his testimony was a surprise to us, and we need cite no authority to show to this court that a party whom a witness takes by surprise is not to be allowed by the court to suffer therefor. The particular portion of this witness's evidence to which we call attention is contained in the letter of January 15, 1901, written by the witness to the counsel for the *Indiana* and introduced by them. At the bottom of p. 196 in this letter the witness, who

was the man up aloft, informing Captain Taylor as to what he saw about the time of the capture, says: "The steamer was then about 12 miles off and heading for the land. We then headed for the stranger, the *Mangrove* still keeping her course for Key West, evidently not having sighted the stranger. When we were within four or five miles of the stranger, and the *Mangrove* about three miles from us on our port bow, she suddenly changed her course so as to hail the stranger." This makes it clear that this man at least meant to testify that the *Indiana* had headed for the stranger *before the Mangrove did.* This is the very idea conveyed in the two consecutive sentences we have quoted. Possibly it was gotten from the report of their watcher who was up aloft, Mr. Munson.

FOURTH COMMENT.—The smooth log follows the last statement, *supra*, with "and at about 6.10 the steamer stopped." This has direct reference to the capture and we have already demonstrated, we think, that the steamer was in the act of stopping when the signal went off at 6.00 that she had changed her course, and it is indubitable that the capture was completed at 6.07.

FIFTH COMMENT.—The smooth log proceeds: "Later the *Mangrove* and the steamer, whose colors we made out to be Spanish, steamed slowly to the westward." As to the closing of the sentence, "steamed *slowly* to the westward," we remark that (speaking of what he could see from the *Indiana*) just before the two vessels "steamed slowly to the westward," Captain Dawson, signal officer of the *Indiana*, testifies, Q. 162, p. 21, Add. Rec. "My recollection is that I saw this boat, which appeared to be no more than a speck in the water somewhere between the two ships." How could people on board the *Indiana* tell, when a ship's boat looked like a speck in the water, whether the *Mangrove* and the *Panama*, when they started south a few moments later, were steaming slowly or rapidly? In

point of fact, the evidence is, as hereinafter cited, clear to show that the *Mangrove*, in view of the fact that it was near sunset, went with the prize as rapidly as possible towards the *Indiana* in order to get a crew to safeguard her when night should come.

We now ask the court to turn to pp. 35, 36, Record, and read the whole log consecutively. Following the statements already commented on we have: "At 6.45 fired shot across bow of steamer and the Spanish colors were hauled down at 6.48. Sent officer and prize crew of the following men [naming them]. *The prize proved to be the Panama," etc.* That "the prize" was deemed by those who made up this log as the prize of the *Indiana*, which had caused the Spanish flag to be hauled down and had put a prize crew on board, is apparent, not only from the collocation of the sentences, but also from the use that was made of this log, which, on the very next day, was set forth by the officers of the *Indiana* as their ground and only ground of prize in the *Panama*.

We think these considerations are sufficient to show that the smooth log of the *Indiana*, which was made up just after the transaction, was compiled in the midst of great excitement, and at a time when the officers who signed it did not clearly and fully comprehend the whole situation as it has since been developed.

Testimony of the Log as to Distances Run by the *Indiana* and the *Mangrove* from 5 o'Clock, When They Parted, till 6.07 o'Clock, the Time of the Capture.

Admiral Taylor's memory is several times at fault in his testimony. He would, of course, himself be glad to correct it by his log, which was not brought to his attention during the examination which took place more than three years after the transaction inquired about took place.

On p. 67, Add. Rec. in answer to the question whether he *continued going away* from the *Mangrove* until he turned to go towards the prize, he insisted that he did not, concluding his answer with: "I stopped the ship when I felt that my signals were plainly visible to the *New York*." Here he is mistaken. The steam-log of the *Indiana* on p. 202, Add. Rec. containing the record of orders from 4 to 8, shows stops at 4.31, when the *Indiana* and *Mangrove* were conferring, and again an order for stopping at 6.45, when the guns were fired. No other stop order is shown. This log runs, "Ahead full speed 5.05; slow speed 5.48"; *and this* latter *order was in force while the signalling was going on with the New York*, the time when the Admiral now thinks he stopped; and it so continued until the order "then full speed" (steam-log, p. 202, Add. Rec.) which must have been given at or before the time when the *Indiana* turned and headed for the steamer.*

Ensign Mustin, of the *New York*, appellants' witness (Rec. 52) says: The *Indiana* at the time of the signals (5.38 to 6 P. M.) was approaching this ship from the direction of the strange steamer. Captain Chadwick of the *New York*, also appellants' witness, says, answering X-Q. 10, p. 102, Add. Rec. "O yes; she [*Indiana*] was moving towards us till she turned."

This evidence shows that Admiral Taylor was also mistaken in the evidence upon which appellants rely for their calculation when under the head of "The *Panama's* Colors" they say, "When the first of these signals was made the *Indiana* was moving towards the *Panama*." Taylor (Add. Rec. 68) says she "continued to move towards the *Panama* between 5.55 and the moment of capture, 6.07, 12 minutes." Admiral Taylor, in testifying that the

* Admiral Taylor himself says (Add. Rec. middle p. 60) "when the gun was fired * * * there was a quickening of the speed," etc., and we think we have demonstrated that the firing of all three guns (the Admiral observed only one) took place about 6 o'clock.

Indiana turned towards the *Mangrove* and *Panama* before 6 o'clock, is contradicted not only by the above witnesses, but by his own log signed by him, and Lieutenant Decker, Rec. 35, saying, "At 6 headed for her."

Admiral Taylor is mistaken also in his memory as to the speed of the *Indiana*. He says, in answer to question near the botton of p. 74, Add. Rec.: "The greatest speed to be sustained and continued for several hours about 8½ knots; on one occasion for a few minutes at the battle of Santiago, 9½, but only for a few minutes."

Again, on p. 60, Add. Rec. near the middle of the page, speaking of the speed at which the *Indiana* went towards the *Mangrove*, he says: "I should say that the average of these speeds for that half hour ranged from 8½ to 7¾ knots; between these two would be the average of what we made, would be about that, from 8¼ to 7¾. In other words, in the neighborhood of 8 knots averaging."

The signal officer of the *Indiana*, appellants' witness says of that same speed (p. 26, answering Q. 219, Add. Rec.): "We put on all speed and probably made 10½ knots." Captain Chadwick, of the flagship, says (p. 98, Q. 12, Add. Rec.) when asked what speed the *Indiana* was making towards the prize, "I should say about 10 knots."

These differences are natural, especially after the lapse of three years. Men's memories vary. The steam-log book, whence all derived their original knowledge, is better evidence. "*Litera scripta manent.*"

The log of the *Indiana* shows in terms, without the aid of calculation, p. 202, Add. Rec. that on May 6, before her bottom was scraped at Guantanamo, the *Indiana* made 10.15 knots for two hours, and this must have been without pushing, as Captain Taylor testifies he was careful not to push her. But Lieut. Dyson shows that (when going towards the *Mangrove* she got this

exceptional order for "all possible speed") she was probably making 10.75 knots. This was the time when the steam-log shows she "captured" the *Panama*. Now the *Indiana* went, as shown by the steam-log, at full speed from 5.05 to 5.48, which was 43 minutes, and at slow speed from 5.48 until—the exact time is not shown at which the order "full speed with order to make 85 turns" was given; but this must mean the time when the *Indiana* "at 6 headed for her." A vessel that did not have time to signal and which for that reason "headed for her," certainly would not continue at a slow pace then, when, as we have shown, the stranger and the *Mangrove* were close together. The order for slow speed given at 5.48 was changed but once, and then to "full speed," with orders to make "85 turns." The only explanation of Admiral Taylor's recollection that he first went at moderate speed and then more rapidly, must be that it is based on the change to his next order for "all speed possible."

But leaving now the question of Admiral Taylor's memory, let us calculate with the above figures of speed before us the distance the *Indiana* had run southward from 5.05 when she left the point where she had parted from the *Mangrove* until 6 o'clock when she turned and "headed for her," the *Panama*. She was going, as we have shown, at full speed from 5.05 till she got the order to slow at 5.48.

At 10.15 knots, which allows 5.91 minutes to the mile, She made 7.26 knots during the 43 minutes from 5.05 to 5.48. Then came the order for slow speed, which continued on the above hypothesis for 12 minutes, from 5.48 to 6 o'clock. Counting this slow speed at 6 knots an hour, a mile in 10 minutes, and in the 12 minutes of slow speed we should have 1.2 knots, which added to 7.27 would make 8.47 knots she had run, away from the point where she parted from the *Mangrove*, at the time

she turned at 6 and ran towards the *Mangrove* and the *Panama* now close together.

The capture was at 6.07. Captain Taylor thinks he started back slowly (Add. Rec. p. 60). But we think he is in error, as we have shown, and that his first order must have been "full speed 85 turns," followed quickly by "all speed possible."* Allowing only 1.09 minutes for turning at 6 o'clock and for getting under full headway (Admiral Taylor says it requires 12 minutes from a condition of rest, Add. Rec. top p. 70), the *Indiana* would have made during the 5.91 minutes remaining till the capture at 6.07, just *one knot* towards the *Panama* and *Mangrove*, which being deducted from 8.47 knots she had run south, would have made her distance at 6.07 from the point where the *Mangrove* left her just 7.47 knots.

The *Mangrove* had run from the *Indiana*, starting at 5 o'clock, as the evidence shows, an hour—from 5 to 6. She could make 8 knots an hour at ordinary full speed, and was undoubtedly going at this speed during this period, which was employed partly in carrying the mail and partly in chasing a prize. If we deduct half a knot for the time she occupied in coming to a stop when she made the capture, we then have, distance by the *Indiana* 7.47+7½ knots by *Mangrove*=14.97 knots, which would measure the distance between the *Mangrove* and the *Panama* at 6.07, the time of the capture. This tallies singularly with the conclusion reached by Judge Locke, who, judging from the evidence then before him, submitted by all the parties, placed the speed of the *Indiana* at 10 and of the *Mangrove* at 8 knots; and, on this calculation, leaving conflicting opinions out of consideration, he decided that the distance of the *Indiana* at the time of the capture was "from 12 to 15 miles at the

* "We turned *hastily* * * * and made at once with *all speed* for the steamer above mentioned." Capt. Dawson, p. 4, Q. 9, Add. Rec.

least." (See Rec. p. 54.) No effort had then been made to minimize the speed of the *Indiana*, and, on the other hand, the Judge had not before him the *Indiana's* log which we have introduced showing that she actually did make during that "chase" 10.75 knots. The evidence of Captain Chadwick and Ensign Mustin, cited *infra*, was enough to convince the Honorable Judge that the *Mangrove* and *Indiana* were running substantially straight away from each other; and our calculation is for all practical purposes accurate, provided the two ships had run straight away from each other all the time. The only remaining question is, how much is to be deducted from the distances traversed by reason of the angles that may have been made by these two vessels in travelling from each other? The course of the *Mangrove* was, as testified by John Peterson, mate, in answer to Interrogatory 3, p. 25, Rec.: "To Key West, N. ¾ E." A point is 11.25 degrees and ¾ of a point is 8.43 degrees E. of N. Ollsen, quartermaster on the *Mangrove*, says, Q. 3, p. 22, Rec.: "On the road to Key West steering N. ¾ E. when we sighted strange vessel." Captain Everett says that he sighted a steamer to the northward and eastward and steered for her. (Q. 3, p. 31, Rec.)

Yeoman Murray, in his second examination, already quoted, said that the *Mangrove* did not chase the *Panama* at all; that they "were almost bows on." And the officer who was in the best position to judge of the relative positions of the three ships, the *Mangrove*, the *Panama* and the *Indiana*, was Captain Chadwick of the *New York*, which ship was farther south and had all the others in view, and he had a much stronger glass than any one else. His attention had first been called to the strange steamer by the *Wilmington*, and as the *New York* made no forward movement, it was simply an observer, lying, as Captain Chadwick says, "dead in the water." Captain

Chadwick says in his claim, p. 48 Rec.: "The *Panama* was about 30 miles N. N. E. from Havana when captured," thus in the line the *Panama* was taking from the channel around the east coast of Florida to Havana, and the map also shows that Key West is slightly east of north of Havana; thus verifying the statement of Peterson the mate and Ollsen the quartermaster of the *Mangrove* as to the course the *Mangrove* was pursuing. And Captain Chadwick further says in answer to Q. 4, p. 97, Add. Rec. speaking of the situation at 5.30: "The *Indiana* at this time was coming towards us in the line between that steamer and ourselves." The testimony of Ensign Mustin, of the *New York*, is to the same effect. "The *Indiana* at the time of the signals was approaching this ship from the direction of the strange steamer." (Rec. Q. 8, p. 52.) Here are no words that can be misconstrued. The testimony of these observers, Captain Chadwick and Ensign Mustin, is exact, satisfactory and convincing, and locates the three ships in their direction as to each other. The testimony of the quartermaster and the mate was in answer to the original and general prize interrogatories, when the points subsequently in dispute could not have occurred to them. Their answers are also definite, exact and satisfactory, and they were made shortly after the transaction.

We therefore reach the conclusion that the *Indiana* and the *Mangrove*, when they parted, went, the *Mangrove* 8.43 degrees east of north, and that the former, the *Indiana*, went so nearly south that, at 5.30, after having travelled toward the *New York* for 25 minutes, she was going in a direction which was about S. S. W. or 22½ degrees west of S. This was very little variation from a straight line. If the *Mangrove* at 5.40, as Captain Quevedo says, headed for the *Panama*, and if her course for 20 minutes was, as the testimony of Captain Everett

shows—and we call particular attention here to what he says about the wind and his having put on sails to increase his speed—N. E. (for twenty minutes), then it only remains to consider how much should be deducted from the above calculations for angles made. It would, we submit, be a very liberal deduction to take 1.47, practically 1½ knots, from the distance covered by these vessels when sailing away from each other in order to arrive at the distance between them at the time of the capture. That is to say, deducting from 14.97 knots 1.47 knots, we have—as shown by the log of the *Indiana* fairly interpreted, supplemented by testimony which is convincing, that the *Indiana* and the *Mangrove* at the time of the capture were 13½ knots apart.

The calculation we will now make, based upon the time the *Indiana* and the *Mangrove* were approaching each other after the capture, confirms and verifies this estimate, and here there is to be no allowance for diverging courses, because the ships were running straight for each other.

Distance *Mangrove* Travelled Towards the *Indiana*.

At 6.07, according to witnesses aboard the *Mangrove*, the boat had already gone over and Ensign Dayton had been landed on the *Panama*. (Q. 5, p. 105; Q. 3, p. 122; QQ. 45–47, p. 134; Q. 8, p. 137; Q. 15, p. 138; Q. 14, p. 158; Q. 7, p. 172; Q. 18, p. 184; all Add. Rec.) It must therefore have been shortly before 6.07 that the *Mangrove* and *Panama* stopped, and very shortly after 6.07 that they started towards the smoke of the *Indiana*. They started as soon as the boat returned, and while it was being hoisted. (QQ. 108–110, p. 117; Q. 20, 21, p. 149; QQ. 29–33, p. 155; QQ. 19–22, p. 162; QQ. 18, 19, p. 167; Q. 13, p. 173; all Add. Rec.)

About the middle of the stop, when the boat that had landed Ensign Dayton shoved off from the *Panama* to return, it was 6.07, and the vessels therefore got under way by 6.10. (See QQ. 241, 242, p. 28; Q. 311, p. 35; QQ. 322, 323, p. 37; p. 42; X-Q. 11, p. 80; Q. 17, p. 85; QQ. 13–21, p. 149; QQ. 28–34, p. 154, 155; QQ. 15–22, p. 162; Q. 48, p. 163; QQ. 14–19, p. 167; Q. 13, p. 173; all in Add. Rec.)

The *Indiana* was approaching while the *Panama* and *Mangrove* were stopped, and when they got under way they came towards the *Indiana*.

The length of the stop, according to a majority of the witnesses, was most probably not longer than 5 or 6 minutes, and it could hardly have taken longer to lower a boat, take an officer to the *Panama*, and return immediately, and as the *Mangrove* was anxious to reach the *Indiana* and get a full prize crew, they went at the best speed of the *Mangrove* till they were greeted with a shot at 6.45 by the *Indiana*.

Appellant's witness Murray, aboard the *Mangrove* says she and the *Panama* were under way together 35 or 40 minutes before the shot was fired, Q. 44, p. 95, Add. Rec; thus corroborating the testimony of our witnesses as to the time she stopped. The *Mangrove*, according to the preponderance of testimony, was making fully 8 knots.

"The *Indiana* was making full speed, between 10 and 11 knots, and the *Mangrove* was apparently making her best speed, which was several knots less, I don't remember exactly what—she was considerably slower." (Q. 9, p. 4, Add. Rec. appellants' witness. Captain Dawson.)

"Speed of *Mangrove* about 6 knots." (Near middle of p. 43, Add. Rec. Appellants' witness, Chaplain Cassard.)

"Not much more than 7 knots." (Near middle p. 59. Admiral Taylor, claimants' witness.)

"Doesn't think she could go over 8 knots." (Q. 32, p. 100. Capt. Chadwick, appellants' witness.)

"About 8 knots." (Q. 59, p. 112. Capt. Everett, appellee's witness.)

"Could not have gone less than that, (8 knots) as we pushed her to utmost." "Might have been little more than 8 knots." (Q. 37, p. 127; X-Q. 20, p. 131. Ensign Palmer, appellee's witness.)

"About 8 knots." (Q. 70, p. 143. Lt. Dayton, appellee's witness.)

"About 8 knots." (QQ. 36–44, pp. 150, 151. Appellee's witness.)

"About 8 knots." (Q. 35, p. 155; 10–13, p. 156. Appellee's witness.)

"Probably a little over 9 knots." (QQ. 9–13, p. 157; 24–26, pp. 158, 159; Q. 9, p. 160. Appellee's witness.)

"Between 8½ and 9 knots." (QQ. 12, 13, p. 167; 20, 21, p. 167; 37, p. 168; 4, p. 169. Appellee's witness.)

"About 8 knots." (11–13, p. 173; 20, p. 174. Appellee's witness.)

"Capable of 9½ knots." (QQ. 9–15, p. 188. Appellee's witness.)

The *Mangrove* practically started off at full speed and did not require more than two or three minutes to get under full headway. (Near top of p. 43, Add. Rec. Chaplain Cassard, appellants' witness.

Q. 100, p. 116. Capt. Everett, appellee's witness.

Q. 36, p. 126; QQ. 38, 39, p. 127. Ensign Palmer, appellee's witness.

Q. 69, p. 143. Lieut. Dayton, appellee's witness.

Q. 23, p. 158. Mate Peterson, appellee's witness.

The *Mangrove* in 35 minutes, at 8 knots, would have travelled 4.66 knots. If we allow that in the first 5 minutes she made only half this speed, then she made in the 35 minutes 4.33 knots.

37

Testimony of the Log.

The steam-log of the *Indiana* not only shows in terms that for two hours, a few days afterwards, the ship made 10.15 knots, but it also fortunately shows the actual number of revolutions her engines were making during this chase (p. 202, Add. Rec.), and Lieutenant Dyson, the engineer officer having the custody of these logs in the Bureau of Steam Engineering, shows that the speed resulting from these revolutions was closer to 10.96 knots than it was to 10.45 knots, and that probably 10¾ knots would have been about the speed made. This, notwithstanding the foulness of bottom of the *Indiana*, as his comparisons were with contemporaneous speed runs (pp. 198–200, Add. Rec.). In calculating, Lieutenant Dyson has been most liberal towards appellants, for in getting his average for 7 days, at 10.45 knots, he takes dates as far off as May 10, while the average for the nearest days would have given greater speed (Q. 7, p. 198, Add. Rec.).

The accuracy of Lieutenant Dyson's calculation is unquestioned. The *Indiana* was undoubtedly at 6.07, the time of the capture, approaching the *Mangrove* at the "best speed possible" and must have continued at that speed for 38 minutes from 6.07 till 6.45, when the log (Rec. p. 35) says "fired shot across bow of steamer," which was the time when her steam-log shows order was given to slow and stop engines (Add. Rec., p. 202). This steam-log does not show the minute at which the orders calling for "full speed with orders to make 85 turns," or the orders to make the "best speed possible" were given, but it does show that these orders followed while the order given at 5.48 for slow speed was in force. And it is quite certain that the first of these orders, "full speed with orders to make 85 turns," was given when, or as, the ship "headed for her at 6.00," because it would have been

quite unreasonable that when Captain Taylor started off at that time to investigate, because it was getting so late there was not time to rely on signalling, he would have gone at a slow rate, especially when he thought the Admiral "did not feel quite confident that the *Mangrove* was of sufficient force to make sure of the prize." And the order for "all possible speed," which must have increased the speed from say 10.15 to 10.75 knots, we assume tohave followed before 6.07, after which there was no firing, for Captain Taylor himself says that it was the firing that quickened his speed (near middle p. 60, Add. Rec.).

If, then, allowing for getting under full headway, we calculate, as previously, that the *Indiana* had turned at 6, and had, allowing for time lost in turning, made one mile towards the *Panama* at 6.07, the date of the capture, and that she ran thereafter at a speed of 10.75 till 6.45, during the 38 minutes she would have covered 6.82 knots. Add to this the distance travelled by the *Mangrove*, 4.33 knots, and we have 11.15 knots without counting the distance between the ships when the gun fired.

Testimony of the Gun.

Opinions vary as to the distance away of the *Indiana* when this shot was fired, as will be seen from the following testimony:

"A mile, possibly more." (QQ. 239, 240, p. 28, Add. Rec. Claimant's witness.)

"Thought one-quarter of a mile." (P. 70. Claimant's witness.)

"Five or six hundred yards." (Q. 15, p. 80. Claimant's witness.)

"I should judge about 2,000 yards." (Q. 3, p. 84. Claimant's witness.)

"I should say about a mile away." (Q. 58, p. 135. Appellee's witness.)

"About a mile and a half from us." (Q. 3, p. 123. Appellee's witness.)

"About a mile away." (Q. 42, p. 140. Appellee's witness.)

"Could not say exactly how far." (Q. 5, p. 151. Appellee's witness.)

"Can not exactly tell; inside of a quarter of a mile, I guess." (Q. 17, p. 156. Appellee's witness.)

"About 1,000 yards." (Q. 5, p. 211. Appellants' witness.)

"About 1,000 yards." (Q. 5, p. 218. Appellants' witness.)

"Probably half a mile." (Q. 5, p. 223. Appellants' witness.)

"About 500 yards." (Q. 5, p. 229. Appellants' witness.)

"Less than a mile and about half a mile." (Q. 5, p. 242. Appellants' witness.)

"Fifteen hundred yards." (Q. 5, p. 248. Appellants' witness.)

"Between 400 or 500 yards away." (P. 254. Appellants' witness.)

"Mile or two away." (Bottom p. 257. Appellants' witness.)

"Between 400 and 600 yards. (P. 261. Appellants' witness.)

We need not resort to these opinions—a guessing match. Major Waller, a witness for the appellants, fired the shot from the *Indiana* which struck very close to the *Panama*, in the direction he gave at an elevation of 4,500 yards. (Q. 9, p. 266, Add. Rec.; QQ. 17–25, pp. 267, 268, Add. Rec.) And the evidence of the gun, therefore, is that the

Mangrove, when this shot was fired, was at least 2.21 knots away. The witness Waller says approximately about 3 miles distant from the *Indiana*. (Q. 25, p. 268, Add. Rec.) But 4,500 yards is equal to 2.21 knots, and we are taking the testimony of the gun and not the opinion of the gunner. We have 6.82 knots (testimony of log of *Indiana*), 2.21 knots (testimony of *Indiana's* gun), plus 4.33 knots (testimony of concurring witnesses), and these together show that the *Indiana* was, at the time of the capture of the *Panama*, 13.35 knots away.

That the vessels must have been this distance apart at the time of the capture is corroborated in another and a very conclusive way. Lieutenant Dayton in his testimony states that a very short time, 5 or 10 minutes after he got on the *Panama*, he saw for the first time the *Indiana*, and what he first saw was her fighting-top. (QQ. 18, 19, p. 138, and X-Q. 12, p. 145, Add. Rec.) He then makes from Table No. 6 of "Bowditch Navigator," a standard work, a calculation as to how far the *Indiana* must have been away at the time he saw her fighting-top, based upon the height of the fighting-top and the height of the bridge of the *Panama*, upon which he was standing, above water level; showing that an object the height of this fighting-top, viewed from the height of the bridge where he was, would be visible above the horizon at 11.4 miles. (QQ. 22, 23, pp. 138, 139, Add. Rec.) In other words, he establishes by a mathematical calculation, the correctness of which is nowhere disputed, that some five or ten minutes after the capture the *Indiana* was still something over 11 miles off.

Indiana's Calculation.

Counsel (p. 59 of brief) make a calculation of the distance apart of the *Indiana* and *Mangrove* as shown by the speed, putting them 7.37 knots without considering the

distance when the gun was fired; yet 7.37 knots is beyond the limit of signal distance as fixed by the preponderance of evidence, or even by the preponderance of the *Indiana's* own evidence. The only opinions that signals could be read at that distance under any circumstances are:

1. Admiral Taylor, near bottom p. 64, Add. Rec.
2. Major Waller, QQ. 41, 45, p. 269, Add. Rec.

That the distance at which they can be read is less than 7.37 knots:

Indiana's own Witnesses.

1. Captain Dawson, Q. 24, p. 6; QQ. 60 and 64, p. 10, Add. Rec.
2. Chaplain Cassard, near top of p. 50, Add. Rec.
3. Gunner Mallery, Q. 26, p. 81, Add. Rec.
4. Carlos, Q. 6, p. 211, Add. Rec.
5. Blackiston, Q. 6, p. 218, Add. Rec.

Appellee's Witnesses.

6. Captain Everett, Q. 52, p. 111, Add. Rec.
7. Ensign Palmer, Q. 21, p. 125, Add. Rec.
8. Lieutenant Dayton, QQ. 31 and 32, p. 139, Add. Rec.

Impartial Witness.

9. Commander Winn, Prize Commissioner, p. 53, Rec.

By the very lowest speed counsel can possibly get from any of the evidence, they are forced to the conclusion that the vessels were 7.37 knots apart; and to bring their calculation within signal distance, they ask that the opinions of the two witnesses, Admiral Taylor and Major Waller, outweigh the testimony of nine other witnesses, five their own witnesses, three ours, and one a totally impartial witness.

That the court should be asked to consider the vessels in signal distance when 7.37 knots apart, is surpassed by

asking it to accept the calculation of 7.37 knots. That calculation—

1st. Does not include the distance the vessels were apart when the *Indiana's* gun was fired.

2d. It is based on a speed of 8 knots for 38 minutes, for the *Indiana*. That she was not making less than 10 knots is supported only by the opinion of the captain and the chaplain and the supposition of Major Waller. That she was making as much as or more that 10 knots we have the opinion of Captain Dawson, Lieutenant Decker and Captain Chadwick, witnesses for appellants, and Captain Everett, Ensign Palmer, and Lieutenant Dayton, for appellee, and the log.

3d. The calculation is based on a speed of 6 knots for 23 minutes to the *Mangrove*. We will not discuss the correctness of the 23 minutes, though the preponderance of testimony is that the vessels did not stop 15 minutes, and the *Mangrove* was therefore under way longer than 23 minutes. But as to this speed of 6 knots, you are asked to accept the testimony of Chaplain Cassard as against all the other witnesses. He alone gives her a speed as low as 6 knots. Opposed to his opinion is to be found, under appellants' witnesses:

1. Captain Dawson, who says the *Indiana* was "making full speed, between 10 and 11 knots, and the *Mangrove* apparently her best speed, which was several knots less." Q. 9, p. 4, Add. Rec. Several knots less certainly does not mean 6 knots.

2. Admiral Taylor, "Not much more than 7 knots." Near middle of p. 5, Add. Rec.

3. Captain Chadwick. Does not think she could go over 8 knots; that she was making at the very lowest 8 knots.

Nine witnesses for appellee, whose testimony is cited

under the heading "Distance *Mangrove* travelled towards *Indiana*," showing she was making at least 8 knots.

Make the calculation counsel has selected, substituting the speeds the evidence shows, and we have, without considering the distance the vessels were apart when the shot was fired:

Indiana, 38 minutes, at 10¾ knots	6.72 knots.
Mangrove, 23 minutes, at 8 knots	3.6
Total	10.32 knots.

You are further asked to assume that the conditions upon this occasion for reading signals were the most favorable. This we contend the evidence shows was not the case.

Admiral Taylor, when asked "Now, what would you call the distance which under most favorable circumstances flag signals could be read," answered:

"Under most favorable conditions of light, clearness of atmosphere, and everything possible, up to 8 miles, under favorable circumstances." (Near bottom p. 64, Add. Rec.)

He also states the most favorable circumstances to be:

"If the sun is shining without any cloud, as low down as possible, but if slightly obscured by haze or clouds, it should be an hour before setting; this would give the most favorable conditions." (Near top p. 65, Add. Rec.)

And when asked "What were the conditions c. ıat afternoon as to atmosphere," he answered:

"My recollection is, that it was favorable above the average, as far as clearness and distinctness of distant objects went—of this I am confident." (Near middle p. 65, Add. Rec.)

Above the average is not a direct statement that the most favorable conditions existed. Colonel Waller states:

"The atmosphere was clear eastward; hazy towards land, but the *Indiana* was between the two ships (the *Mangrove* and *Panama*) and the land." (Q. 7, p. 266, Add. Rec.)

That it was even so hazy that light signals could have been used on the *Panama*, though as a general rule they would not have been used, appears from the testimony of Yeoman Murray, a witness for appellant and on the *Mangrove*. (QQ. 28–33, p. 94, Add. Rec.)

Captain Dawson, referring to the position of the sun at the time of the capture, says:

"A. I do not consider that it was either particularly favorable or unfavorable. There was ample light and its position would not be such as to interfere with a clear vision between the stations."

He admits that it would be harder to distinguish colors at 15 minutes before sunset than an hour before; and when asked—

"Q. Well, now, if it would be harder to distinguish colors at 15 minutes before the sun sets at a distance than at an hour before the sun set, would you say that fifteen minutes before the sun set is the most favorable condition under which to read signals?

"A. No, sir." (QQ. 268–274, pp. 30, 31, Add. Rec.)

Commander Everett, a witness for the appellee, states that the conditions at the time of the capture, for reading signals, were not so favorable as they would have been a half hour earlier. (QQ. 48, 49, p. 111, Add. Rec.)

Ensign Palmer, a witness for appellee, stated that near noon, when there is most light, is the most favorable time for reading signals, as everything depends upon distinguishing the colors in the flags; and that the conditions were fairly good for that time of day, but it is very hard

to read signals about sunset, as the light is generally not good. (QQ. 22, 23, p. 125.)

Lieutenant Dayton, a witness for appellee, states the conditions at the time of the capture as fairly good; probably not as good as at noon, or near noon. (Q. 33, p. 140, Add. Rec.)

Thus the evidence does not bear out the supposition that the conditions were the most favorable.

Distances at Which Signals Can Be Read.

THE FOLLOWING EVIDENCE ALL RELATES TO SIGNALLING WITH FLAGS OF AT LEAST THE USUAL SIZE, AS NO QUESTION PUT MENTIONS OR SUGGESTS SMALLER SIZES. NO WITNESS WAS ASKED HOW FAR BOAT-FLAGS, SUCH AS THE "MANGROVE" HAD, WERE EVER KNOWN TO HAVE BEEN USED. THESE WERE ONLY ABOUT ONE-SEVENTH THE USUAL SIZE:

Commander Winn, a United States Prize Commissioner before the Court at Key West, estimates 5 miles as a maximum distance at which signals of every description, day or night, can be distinguished and read. (P. 53, Rec.) The opinion of witnesses examined in this case as to the distances at which day signals can be read are to be found as follows:

"Supposedly 5 or 6 miles, but not tried over a measured distance." (Q. 24, p. 6; Q. 60, p. 10; Q. 64, p. 10, Add. Rec. Capt. Dawson, witness for appellants.)

"Six and two-thirds miles, under certain conditions." (Chaplain Cassard; near top of page 50, Add. Rec. Witness for appellants.)

"Under most favorable conditions of light, clearness of atmosphere, and everything, possibly up to eight miles, under favorable circumstances." (Near bottom of p. 64, Add. Rec. Admiral Taylor, for appellants.)

"Under most favorable circumstances about 5 miles." (X-Q. 26, p. 81, Add. Rec. Mallery, for appellants.

"Extreme distance at which can be read about six miles, under favorable circumstances, with a powerful glass." (Q. 52, p. 111, Add. Rec. Captain Everett, witness for appellee.)

"Four and a-half to five miles under the most favorable circumstances." (Q. 21, p. 125, Add. Rec. Ensign Palmer, witness for appellee.)

"Between 4 and 5 miles." (QQ. 31, 32, p. 139, Add. Rec. Lieutenant Dayton, witness for appellee.)

"Read signals one mile." (Q. 6, p. 211, Add. Rec. Carlos, witness for appellants.)

"Judge had read signals about 7 miles, from what officers told him." (Q. 6, p. 218, Add. Rec. Blackiston, for appellants.)

"About 8 miles, but that is very close measurement." (QQ. 41–45, p. 269, Add. Rec. Major Waller, for appellants.)

The evidence of witnesses who give reasons for their opinions, such as having read or failed to read signals at a known distance, justifies the conclusion that 5 miles is very close to the maximum limit that signals with the usual flags can be read with any certainty, under ordinarily favorable circumstances, and that beyond that distance reading them is a matter of great uncertainty, depending upon such a variety of circumstances as to make it almost impossible to say, without an actual test, whether a signal would be intelligible. The reading of flag signals consists not only in recognizing objects, but in distinguishing colors. The hour of sunset in the neighborhood of the occurrence was, April 25, 1898, 6.25 P. M. (P. 203, Add. Rec.) The capture, therefore, took place about 18 minutes before sunset.

Testimony bearing upon this time for reading signals as favorable or unfavorable:

QQ. 273, 274, pp. 30, 31; pp. 64, 65; p. 71; Q. 22, 23, p. 125; QQ. 48, 49, p. 111; QQ. 18, 19, p. 131; Q. 33, p. 140; QQ. 28–30, p. 150; Q. 145, p. 269, all Add. Rec.

According to one witness for appellant, who was on the *Mangrove*, it was a little hazy and light signals could have been used. (QQ. 29–33, p. 94; QQ. 28, 29, p. 150, all Add. Rec.)

Admiral Taylor is the only witness who gives the most favorable hour for reading signals as close to sunset. We think it is common experience that shortly before sunset, in the stillness of the dying day, with a favorable background, the outlines of objects loom up with particular clearness, and for the very reason that there is not sufficient light to distinguish colors in objects, and the mind is not diverted by distinctions. A mountain as night approaches becomes a mountain, a tree a tree, and their outlines loom up because the light does not permit one to distinguish on the mountain woodland and field, depression and eminence; or in the tree the colors of branch and leaf.

Boat Signals on the *Mangrove*.

The *Mangrove* had on board only boat-flags, 3 x 4 feet. (QQ. 48, 49, p. 129; Q. 39, p. 140, Add. Rec). Regular navy signal flags are about 8 x 11 feet (Q. 48, p. 129, Add. Rec.) or even larger, if Captain Davison's estimate be correct. (QQ. 50–54, p. 9, Add. Rec.) But take them at 8 x 11, which approximates their actual size, 8¼ x 11, sufficiently for the calculation, and there will be 88 square feet of surface to see in a regular navy signal flag, as against only 12 square feet in a boat-flag, or one is over 7 times the size of the other.

The court judicially knows that a flag presenting a surface of 12 feet can not be read as far as one having a surface of 88 feet, but it can not know without evidence what the difference would be. For want of evidence of this point appellants' case must fail.

Colonel Waller is, as we remember, the only witness who hazards the opinion that signals with boat-flags could have been read if they had been made at the time spoken of. (Q. 40, p. 269, Add Rec.) His opinion is not only unsupported by any other witness, but he does not give any instance where boat signals were known to have been read at 3, 4, 5 miles, or any other distance.

There is testimony bearing upon the distance at which other day signals could be read.

1st. WIG-WAG SIGNALS.—Can not be read as far as flag signals, so they need not be considered.

2d. SEMAPHORE SIGNALS.—Not in general use in the navy. (For evidence, QQ. 95–99, p. 13, Add. Rec.) The *New York* was the only vessel equipped with semaphore signals.

3d. SOUND SIGNALS.—(See Q. 34, pp. 7–8, Add. Rec.; Q. 107, p. 14, Add. Rec.; Q. 151, p. 20, Add. Rec.) From this testimony and reference to the signal book, it appears that sound signals are not used in the day, except in a fog, mist, or falling snow. (QQ. 56–57, p. 142, Add. Rec.) The *Mangrove* could not have made whistle signals. (See Q. 34, p. 7, Add. Rec., appellants' own witness.)

Gun Signals.

For testimony, see Q. 33, p. 7; QQ. 120–140, pp. 16–18; Q. 145, p. 19; Q. 159, p. 21; QQ. 316–319, p. 37; p. 62; p. 72; p. 73; QQ. 18–25, p. 81; QQ. 74–75, p. 113–114; QQ. 28, 29, pp. 125, 126; QQ. 6–7, p. 130; QQ. 55–62, p. 142, all Add. Rec.

Under the head of Sound Signals the Signal Code says:

"At night, or in a fog, mist, or falling snow by day or night, sound signals may be made with gun, bell, fog horn or steam whistle.

GUN: In case of extreme urgency guns may be fired, using the General Signal Book. The numbers will be made as in the numerals of the Navy Code," etc. (Q. 57, p. 142, Add. Rec.)

While the code prescribes, under the circumstances above stated, that sound signals may be made by guns, all the testimony is that sound signals have never been so made in our own or any other navy. Even if gun signals could have been made and understood, the distance at which such signals could have been read is absolutely unknown. Sound is most variable. In one direction guns might be heard much further than ordinary signal distance, while in another they could not be heard as far as is now ordinarily considered signal distance.

Admiral Taylor says guns are at times heard from 80 to 100 miles, under rare conditions of atmosphere (just above middle of p. 73, Add. Rec); other witnesses have heard guns 30 miles at sea (Q. 30, p. 103, Add. Rec.; Q. 2, p. 229, Add. Rec.); yet it could hardly be contended that signal distance is as far as a gun could be heard, and no witness ventures an opinion as to what is signal distance by guns. Gun signals are peculiarly sound signals and so defined by the code, yet none of the witnesses who theorize regarding the same are certain that they heard the guns fired on the *Mangrove.*

Captain Dawson's testimony finally sifts down to his not remembering hearing the report. (QQ. 10–12, p. 5, Add. Rec.; 75–77, p. 11; 332–334, p. 38, Add. Rec.)

Admiral Taylor says: "Saw smoke shoot from the muzzle of the gun (only one). Can not remember whether

I heard the sound." (Just below middle of p. 58, Add. Rec.)

Gunner Mallery is not exactly clear in his mind as to whether he heard the report of the gun (one). (Q. 14, p. 78, Add. Rec.)

Colonel Waller, asked whether he saw or heard this shot, states: "I saw it. I saw the smoke from the gun." (5, p. 266.)

Thus all the chief witnesses for the appellants, and all who discuss gun signalling, either did not hear the guns that were actually fired, or are uncertain whether they did.

The testimony of other witnesses, some of whom use the expression "seeing" the guns fired and some "hearing" them, as will appear further on, is too indefinite and unreliable for their testimony to warrant any conclusions favorable to appellants, when none of the experts on gun signalling heard the report of a single gun. That signals could be made intelligently by guns in time of war, so as to spell out words, as it is claimed the signal code intends, can not be shown. The most that could be gotten out of gun firing would be an intimation that something was going on, but just what could not be determined.

The signal book, however, was produced by a witness for the appellee, and shows that no provision is made for gun signalling at all under the circumstances that existed here.

As stated in the brief of counsel for the *Indiana*,

"The test made by this statute is, whether the claiming vessel was within signal distance of the capturing vessel; that is, could the capturing vessel signal to the claiming vessel?"

We agree with counsel as to the correctness of this test, but the case fails completely to come up to the test.

It has not been shown by a single witness the distance at which boat signal flags, 3 x 4, the only kind aboard the *Mangrove*, can be read.

Likewise there is not a particle of evidence of how far gun signals can be read. In the brief for the *Indiana* it is stated:

"The testimony agrees in establishing the following facts: * * *

"2. They (witnesses on the *Indiana*) also saw or heard the firing of one or more of the *Mangrove's* guns."

This conclusion is fairly stated. The *Mangrove* fired three guns; and if the sum of all the evidence is, that the witnesses "saw or heard the firing of one or more" of these guns, then it is clear the *Mangrove* could not have made with her gun signals the number of and the intervals between which could be noted. The impossibility of signaling by guns is from the evidence so conclusive that it is needless to discuss whether gun signalling be within the statute.

Speed of the *Indiana*—Other Evidence.

Her steam-log at the very time is, as heretofore stated, the best evidence of the *Indiana's* speed, and its correctness is not questioned. We here refer to other evidence corroborating the log only because a few witnesses now attempt to minimize the speed of their ship. *In preparatorio* there were no answers belittling the *Indiana's* speed, Lieutenant Decker (Q. 3, p. 40, Rec.) and Captain Dawson (Q. 5, p. 41 Rec.), both of the *Indiana*, each gave her speed as about 10 knots. Captain Dawson, re-examined, still gives her a speed of over 10 knots; and when called upon to figure the distance away of the *Indiana* at the time of the capture, based on statements he had made, demonstrated mathematically that the *Indiana*,

at the capture, was some 9.6 knots from the *Mangrove*. (QQ. 215–259, pp. 26–29, Add. Rec.)

Thereupon the chaplain was put forward as an authority on speed, and he swore the *Indiana's* limit down to 7 or 7½ knots per hour; yet, when asked to calculate the *Indiana's* distance away by the time the two vessels took to meet, on his own statements as to the speeds they were making and as to how long the *Mangrove* stopped, he demonstrated that the *Indiana* must at the time of the capture have been 6¾ knots away (Add. Rec. p. 49) and that without including the distance apart the vessels were when the *Indiana* fired, at 6.45 P. M. (Add. Rec. pp. 50–51), the testimony of the gun heretofore cited showing that this distance, to be added, was 2.21 knots.

The testimony of the next witness, Admiral Taylor, then captain commanding the *Indiana*, we have already commented on. He seems to have had an unrealized apprehension that his vessel would give out, which may have been justified from the fact that though built for a 15-knot ship she had become capable of only between 10 and 11 knots.

Ensign Palmer, who was on the flagship at the time, testifies that at the close of the war, when the fleet made its home voyage, the *Indiana* was one of the number; that the voyage was made in about 5 days; that the speed of the squadron was 10 knots, as they were due to arrive in New York on a certain day; that after running for two or three days at that speed the *Indiana* signalled, "We can not maintain the present speed," and that the flagship then signalled, "Make the best of your way to New York," and the squadron proceeded; that thereupon the speed of the squadron was increased from one-half a knot to a knot; that this speed was maintained until New York was reached, and that the *Indiana* did not drop behind,

but maintained the increased speed, arriving with the rest of the squadron (Q. 44, p. 127, 128, Add. Rec).

This testimony of Ensign Palmer is nowhere disputed, though the logs of the vessels have at all times been available to the appellants to disprove the statement. Between the time of the capture of the *Panama* and the return to New York the *Indiana* was never where more than minor repairs could have been made to her engines.

Evidence of the speed the *Indiana* was making, or could make, is as follows:

Indiana less than 10 knots—

1. Chaplain Cassard (*Indiana*), p. 48, Add. Rec.
2. Admiral Taylor (*Indiana*), p. 60, Add. Rec.
3. Colonel Waller (*Indiana*), Q. 14, p. 267.

Indiana 10 knots or over—

1. Steam-log.
2. Ensign Palmer, appellee, trip home from Santiago.
3. Captain Everett, appellee, Q. 67, p. 113.
4. Ensign Palmer, appellee, Q. 60, p. 135.
5. Lieutenant Dayton, appellee, Q. 72, p. 143.
6. Captain Dawson (*Indiana*), Q. 5, p. 41, Rec.; Q. 9, p. 4, Add. Rec.; QQ. 223, 224, pp. 26, 27, Add. Rec.
7. Lieutenant Decker (*Indiana*), Q. 3, p. 40, Rec.
8. Captain Chadwick (*New York*), Q. 12, p. 98, Add. Rec.

Indiana's Chief Witnesses — Contradictions.

Indiana's brief says, page 25, that when examined after three or four years "differences of recollection do not detract from the good faith of the witnesses." Admitted; but such differences, *if material*, do detract materially from the weight of their testimony. We call attention to the differences between the three principal witnesses of the *Indiana*, and also to some differences with the *Indiana's* log.

1. Estimates of distances of shot fired at 6.45 from

Indiana to the other two vessels: Captain Taylor, ¼ to ½ mile; Captain Dawson a mile or more; Colonel Waller, 3 miles.

2. Captain Dawson, Q. 9, p. 4, Rec.: "When the *Indiana* turned back to go towards the *Panama*, we *turned hastily* before reaching the *New York*, putting the helm hard over, and *made at once with all possible speed* for the steamer above mentioned." Admiral Taylor, p. 60, Add. Rec.: "We *were not in haste* when we first started towards the prize." Lieutenant Decker of *Indiana*, p. 40, Rec. 40, Int. 3: "About 6 headed for her, agoing about 10 knots."

Captain Dawson's reason for starting back hurriedly was: Upon *becoming convinced*, as both the officer of the deck and I were talking with Munson, that *she was a Spaniard* and probably the *Panama*." (Rec. *supra*.)

Admiral Taylor: "I *interpreted the signal* [on the flagship] to indicate a wish to have me investigate." (Add. Rec. top p. 58.)

3. Captain Dawson gives speed going back, 10–11 knots. (Ev. *supra*.) Admiral Taylor, average 8 knots, 10 impossible.

4. Taylor, p. 58, Add. Rec.: "I saw the boat distinctly * * * My impression is that I saw it first without binoculars, and that I afterwards used binoculars and saw it more plainly." Add. Rec. p. 63: "I saw there were people in the boat."

Dawson used spyglasses (stronger than binoculars), Q. 16, p. 5, Add. Rec.: "And the boat appeared no more than a speck on the water.

5. Dawson says nothing about the *Indiana* stopping during the southward run. Taylor, Add. Rec. p. 67, says: "I stopped the ship * * * My recollection is I stopped the engines." Asked the length of the stop, he says, p. 68: "I can not remember, but I should say five minutes." Steam log shows other stops during this

period (p. 202), but none here, and the Admiral is further shown to be in error by Captain Chadwick (X-QQ. 9 and 10, p. 102, Add. Rec.), and Lieutenant Mustin (Q. 9, p. 51, Rec.), both on the *New York*, which was "lying dead in the water." Add. Rec. Q. 11, p. 98, Mustin saying, "The *Indiana* at the time of these signals was approaching this ship," etc.; and Captain Chadwick, "She was moving towards us till she turned."

6. Dawson's reason for firing the gun at 6.45: "Because we saw the Spanish flag flying." (Q. 347, p. 40, Add. Rec.) Taylor's reason for same, bottom p. 61: "Primarily, for fear prize would escape."

We have already called attention to the log's material contradiction of Admiral Taylor's memory about the speed of the *Indiana*, and the smooth log which shows "he started back about 6," instead of 5.55 as he says.

7. Colonel Waller saw no boat, but, Q. 5, p. 266, Add. Rec.: "I saw the smoke from the gun."

The only four witnesses examined for the *Indiana*, who occupied positions of vantage, were Captain Taylor, Captain Dawson, Apprentice Lindsay, on the bridge, and Colonel Waller on top of the turret. Of these, Lindsay is to be eliminated, because he is shown, as hereinafter set forth, to have sworn falsely.

The other thirteen witnesses whose observations on the *Indiana* are relied on, were all on deck. The *Indiana* had at least twenty-five officers who were not called. Most of them were probably on deck during the chase. They would have been the most intelligent observers. The presumption is that no one of them was willing to say he saw anything from the deck that would help his case.

It is to the credit of the probably 500 enlisted men on the *Indiana* that the testimony of only thirteen in all has been collected, from widely separated parts of the world, as counsel's brief sets forth, who have volunteered to say

that they saw from the deck, and the most of them with the naked eye, objects which were not only invisible to commissioned officers on deck, but which were also, *e. g.*, the number of people in the boat, invisible to officers above with glasses. A few of them saw nothing of importance. The testimony of those who say they did is shown by the brief analysis given further on to be inherently worthless.

Apparent contradictions aside, it can not be, even according to the *Indiana's* calculation of distances run, that there was a line of vision from the *Indiana's* deck to the boat in the water.

Opinions as to Signal Distance Based on Recollections of What Witnesses Saw.

On opinions that the *Mangrove* was only so many miles away, witnesses base opinions that the *Indiana* was within signal distance by flags. These opinions it is attempted to strengthen by evidence, first, as to hearing or seeing guns fired by the *Mangrove*, and second, of seeing a boat in the water between the *Mangrove* and the *Panama*. But it is nowhere shown that one can read flag signals a distance he can see or hear a gun fired, or see a boat. Nor is there any attempt whatever to show that one could distinguish the color of a 3 x 4 boat-flag as far as a fifteen-foot boat could be seen. Captain Dawson considers the relation between the distance at which you might see a flag, or see smoke from a gun, nothing more than guesswork (QQ. 83–90, pp. 12, 13, Add. Rec.), and Captain Chadwick, in answer to the question, "Is the distance at which you could see smoke any measure of the distance at which you could read flag signals?" says: "No, I should say not; because you can see the form of signals without being able to see their colors. The visibility of signals depends almost altogether upon the direction in

which the light falls upon them with respect to the position of the observer. Thus, in order to read signals well, you must have the light at your back and you must be between the light and the signals" (Q. 31, p. 103, Add. Rec). These are both witnesses for the appellant. Captain Chadwick also says guns can be heard 30 miles (Q. 30, p. 103, Add. Rec.), and Admiral Taylor that they have been heard 85 to 100 miles (p. 73, Add. Rec.), and no one puts the extreme limit for reading flag signals beyond 8 miles.

Admiral Taylor states that with binoculars and spyglasses, respectively, you can see a boat from 4 to 6 miles (Add. Rec. p. 63). Still he can not give an approximation of how many times binoculars magnify (p. 63, Add. Rec.); and gives no reason for fixing on four or six miles respectively.

Ensign Palmer states that over a measured distance of 5 miles not only had he seen boats but had been able to distinguish which ships the boats belonged to; also that smoke from a gun at sea can be seen about 10 miles (QQ. 30–33, p. 126, Add. Rec.; 8–13, p. 130, and 17, p. 131, Add. Rec.)

Testimony As To Seeing a Boat.

QQ. 13–16, p. 5; 160–178, pp. 21–22; 325–330, pp. 37, 38, all Add. Rec. Captain Dawson.

Pp. 58, 62, 63, Add. Rec. Admiral Taylor.

QQ. 16–23, p. 78; 7–10, p. 80, Add. Rec. Gunner Mallery.

QQ. 8–11, p. 84; 10–14, p. 85; 18–20, p. 85, Add. Rec. Perkins.

QQ. 8–10, p. 210; 4, p. 211, Add. Rec. Carlos.

QQ. 9, 10, p. 216; has seen boats at sea about 8 miles; 3, p. 217 Add. Rec. Blackiston.

QQ. 9, 10, p. 222; seen boats perhaps 10 miles; 3, p. 223, Add. Rec. Abbott.

QQ. 9, 10, p. 228, Add. Rec.; seen small cutters 8 or 9 miles, steam launches 7 miles; Q. 3, p. 229, Add. Rec. Lindsay.

QQ. 9, 10, p. 240, Add. Rec.; seen a boat at sea about 8 miles; Lee. Between 6 and 7 miles; Geary; Q. 3, pp. 241–242, Add. Rec.

Relative to seeing or hearing a gun:

QQ. 10–12, p. 5; 331–338, p. 38, Add. Rec. Captain Dawson.

QQ. 11–15, pp. 77, 78; 18–24, p. 78, Add. Rec. Gunner Mallery.

Q. 6, p. 216, heard guns fired 10 miles; Q. 2, p. 217, Add. Rec. Blackiston.

Q. 7, p. 222, Add. Rec; heard guns fired 9 miles; Q. 2, p. 223, Add. Rec. Abbott.

Q. 7, p. 228, heard gun fired 30 miles; Q. 2, p. 229. Lindsay.

Q. 7, p. 234, Add. Rec., heard gun fired at sea about 1 mile; Q 2, p. 335, Add. Rec. Coffee.

Q. 6, 7, pp. 239, 240, Add. Rec., heard gun fired about 10 miles; and about 9 or 10 miles respectively; Q 2, p. 241, Add, Rec. Lee and Geary.

Saw smoke, Q. 5, p. 266, Add. Rec. Colonel Waller.

All these witnesses to seeing the boat, or seeing and hearing a gun fired, are very indefinite as to other occurrences which naturally ought to have impressed themselves upon their minds. The boat is described as anywhere from the size of a speck to that of a bath tub.

Some describe it as one kind of a boat, some as another; some say it was dark. Some testify to seeing people in it, some none. Some testify that six or eight people were in it, which is about the usual boat's crew. The testimony of those on the Mangrove in a position

to know and whom Chaplain Cassard and Mr. Murray certainly had the opportunity to contradict, is that there were only three people in the boat when it went over, and two when it came back and that the boat was white.

QQ. 24, 25, p. 109, Add. Rec.—Captain Everett. Q. 15, p. 149; QQ. 6–9, p. 151, Add. Rec.—Chase. Q. 15, p. 156, Add. Rec.—Overn. QQ. 11–13, p. 162, Add. Rec.—Hansen. Q. 16, p. 167, Add. Rec.—Ellmore.

In preparatorio no one testified about either having seen the boat or the gun fire. Everybody aboard the *Indiana* knew within some three-quarters of an hour after the capture that the little lighthouse tender *Mangrove*, unaided, had brought the *Panama* to the *Indiana* in charge of an officer from the *Mangrove*, and must have known that the *Mangrove* did not put an officer aboard the *Panama* without sending a boat across, and that a gun was invariably fired in making a capture.

Recollection as to the boat and gun, sometimes guns, appears to have been singularly stimulated after it was learned that officers who had glasses had testified to seeing a boat and smoke.

Opinions as to Signal Distance—Analysis of Testimony.

1. Captain Dawson.—Of opinion that vessels were within signal distance at time of lowering boat from *Mangrove*. (QQ. 26, 27, p. 7, Add. Rec.) Opinion distance to *Mangrove* then as probably between 4 to 6 miles. (Q. 31, p. 7, Add. Rec.) Estimates the distance at which flag signals can be read, under favorable circumstances, at from 5 to 6 miles. (Q. 64, p. 10, Add. Rec.) But has no distinct recollection of ever determining the extreme limit of signal distance, and 5 or 6 miles only an estimate of his, as the distance was not measured or known at the time. (Q. 24, p. 6; Q. 60, p. 10, Add. Rec.)

His opinions of distance vessels were apart and that he could have read signals related to the time the boat was lowered; yet he never saw the boat lowered. (Q. 160, p. 21, Add. Rec.) And we submit he was none too certain about having seen a boat. (QQ. 160–178, pp. 21, 22, Add. Rec.)

2. CHAPLAIN CASSARD.—*Indiana* within signal distance when *Mangrove* and *Panama* stopped. (Midway p. 44, Add. Rec.) In his opinion the distance away of the *Indiana* was 3 or 4 miles. (Near middle of p. 48, Add. Rec.) Also states (near top of p. 50, Add. Rec.) that under certain conditions he thinks signals could be read 6¾ miles; yet he states (near the middle of p. 48, Add. Rec.) that he had never given or received signals, and these were not signals of a character it behooves a chaplain to heed.

3. ADMIRAL TAYLOR.—Asked *Indiana's* distance from the *New York* when exchanging signals he states he might form some estimate by reference to the *Indiana's* log, and could have formed that estimate at the time, but at this lapse of time he could not form a close estimate. (About middle of p. 75, Add. Rec.) Without having the log, however, he gives an opinion that the *Mangrove* was in signal distance of the *Indiana*.

He is very emphatic, and says: "Yes, within good signal distance. I did not doubt then, and I do not doubt now, that any signals, either ordinary or extraordinary, would have been plainly perceived and recognized by us, and answered by us." (Near middle p. 59, Add. Rec.) Still, he does seem to have some doubt as to having been in such good signal distance, when questioned as to why he did not signal to the *Mangrove*, for he says: "At great distances it takes some time" to signal, and refers to its always being slow when you come near the limit. (Near middle p. 69.) Still, he places the

limit of signal distance, under the most favorable circumstances, up to eight miles; and he undertakes to put the *Mangrove* at a much closer distance. He says she did not appear to be more than 3½ to 4 miles away, near bot. p. 65, Add. Rec. and thinks he first saw the boat without glasses, and then with glasses, and that with good eyesight with the naked eye one could see a boat only from 2½ to 3 miles, and with binoculars four miles. His recollection as follows is clearly shown to have been inaccurate: Of the varying speeds at which they were going during the half hour following the capture; of the *Indiana* not being able during the war to maintain a continuous speed of over 8½ knots; that at this particular time she was only averaging about eight knots; and that when she turned to go into the chase she was lying dead in the water.

Do not all these inaccuracies show that the witness's recollection is entirely too treacherous to make his opinion that the *Indiana* was in signal distance of value? He enumerates, about the middle of p. 59, Add. Rec. the very things in which his recollection is proven to be at fault, upon which to base his opinion that the *Indiana* was in signal distance.

4. MALLERY.—As basis for his opinion that vessels were within signal distance, he gives the opinion they were only 4 or 4½ miles apart. (Q. 30, p. 79, Add. Rec.) Thinks about 5 miles the longest distance one can read signals. (Q. 26, p. 81, Add. Rec.) Does not remember being able to make out colors of the Spanish flag until it was hauled down after the shot from the *Indiana*. (Q. 45, p. 83, Add. Rec.

5. PERKINS.—Saw a boat (QQ. 9–14, p. 84, Add. Rec). and at that time, with glasses, could have seen signal flags on *Mangrove* clearly enough to tell one flag from another. (Q. 20, p. 84, Add. Rec.) Is evidently talking about boat coming from *Mangrove* to *Indiana* and not from *Man-*

grove to *Panama*. (QQ. 10–14, p. 85, Add. Rec.) Did not know that *Mangrove* and *Panama* stopped at all. (Q. 16, p. 85, Add. Rec.) Says when boat went over *Mangrove* and *Panama* were a couple of miles off, or about 1½ miles. (QQ. 20–22, p. 85, Add. Rec.) That when all this occurred the sun was probably an hour high; yet when the *Indiana* fired the sun was down. (QQ. 31–33, p. 86, Add. Rec.)

6. MURRAY.—This sailor from the *Indiana*, who was on *Mangrove* when Ensign Dayton went aboard the *Panama*, says *Indiana* within signalling distance, could have signalled without any trouble. (Q. 15, p. 91, Add. Rec.) When asked what means of signalling could have been used without any trouble, says, "The Ardois system." (Q. 16, p. 91, Add. Rec.) This is a light signal, for use at night, and witness explains that it was not customary to make such signals in the day time, but it was a little hazy; that the *Indiana* could have made those signals very easily; and that it was hazy enough for the *Mangrove* to have used them (QQ. 28–33, p. 94, Add. Rec.); considered *Indiana* when Ensign Dayton went aboard *Panama* only from 4 to 6 miles away. (Q. 22, p. 91, Add. Rec.) He says even wig-wag signals could have been read, while no other witness testifies that wig-wag signals could be read as far as 6 miles; and he states he had read such signals 12 miles, though not in the navy. (QQ. 34, 35, p. 95, Add. Rec.)

7. CARLOS.—Could have read signals, because saw men on *Mangrove's* deck (Q. 12, p. 210, Add. Rec.), something that no one else saw; also saw boat; it was a whale-boat, and had from 6 to 10 people in it (Q. 4, p. 211, Add. Rec.); did not hear gun fire, but saw them working and securing a gun on the starboard side of the *Mangrove* (Q. 7, p. 209, Add. Rec.); estimates regulation signal flag in navy as only about 5 or 6 feet long; had read them about a

mile away and judged this to be distance ships were apart—from which he had read them. (Q. 6, p. 211, Add. Rec.)

8. BLACKISTON.—*Panama* and *Mangrove* 7 or 8 miles distance from *Indiana* when heard *Mangrove's* guns fired (Q. 4, p. 216, Add. Rec.); thinks flag signals could have been read, because flag signals could be discerned on Morro Castle, when *Indiana* said to be lying 7 miles off Santiago (Q. 12, p. 217, Add. Rec.); had heard guns fired 10 miles (Q. 2, p. 217, Add. Rec.); had seen boats 8 miles (Q. 3, p. 217, Add. Rec.); had read signals about 7 miles, judging from what the quartermaster and officer of the deck told him at the time (Q. 6, p. 218, Add. Rec.)

9. ABBOTT.—Had experience reading flags, no particular experience making signals. (Q. 11, p. 222, Add. Rec.) He does not wish to make statement as to reading signals at a distance. "It never has been my duty to read flag signals; I am unable to give the size of No. 1 signal flags." (Q. 6, near top of p. 224, Add. Rec.) Still believes flags might have been distinguished when boat went from *Mangrove* to *Panama*. (Q. 12, p. 222, Add. Rec.) Saw smoke of one gun. (Q. 6, p. 222, Add. Rec.) Distinguished boat afloat between two vessels with naked eye. (QQ. 9, 10, p. 222, Add. Rec.) Had seen boats at sea perhaps 10 miles, and he should judge it was about 6.30 when he saw the smoke of the gun from the *Mangrove*. (Q. 3, p. 223, Add. Rec.) Had heard guns fire at sea 9 miles. (Q. 2, p. 223, Add. Rec.) Boat he saw in water had regular crew in it, but could not swear it went from the *Mangrove* to the *Panama*. (Q. 4, p. 223, Add. Rec.)

10. LINDSAY.—Been apprentice; five months' experience signalling. (Q. 11, p. 288, Add. Rec.) When boat went from *Panama* to *Mangrove* signal flags could have been read with a glass from the *Indiana*. (Q. 12, p. 228,

Add. Rec.) Sizes of signal flags 7 feet hoisted and 9 feet flying. On clear day had read signals at distance of a mile. When first saw *Panama*, *Mangrove* about 8 miles away. (Q. 4, p. 227, Add. Rec.) Saw smoke and heard report of gun. (Q. 7, p. 228, Add. Rec.) Saw boat with naked eye. (Q. 10, p. 228, Add. Rec.) Had seen a boat 8 or 7 miles. Saw signals made by the *Mangrove* when she captured the *Panama*, but did not read them. (Q. 7, near top of p. 230, Add. Rec.)

11. COFFEE.—Not acquainted with flag signals. (Q. 11, p. 234, Add. Rec.) Thinks had flags been hoisted on *Mangrove* they could have been seen. (Q. 12, p. 234, Add. Rec.) Did not see any boat (QQ. 8, 9, p. 234, Add. Rec.) Heard a gun fired from the *Mangrove* at about 7.30. (Q. 3, p. 235, Add. Rec.) Boat went from the *Indiana* to *Panama* about 8 o'clock. (Q. 4, p. 235, Add. Rec.) Did not see the *Indiana* fire at all. (Q. 5, p. 235, Add. Rec.)

12 and 13. LEE and GEARY.—Had neither of them had experience with signalling (Q. 11, p. 240, and Q. 6, p. 242, Add. Rec.), yet state could have made out signal flags, because they made out Spanish flag 5 minutes before boat went across. (Q. 12, p. 241, Add. Rec.) These witnesses both claim also to have seen the *Mangrove* fly signals, though the *Mangrove* never made any signals. (Q. 7, p. 242, Add. Rec.) Lee says *Mangrove* only stopped a minute and the *Panama* not at all until stopped by the *Indiana* (Q. 1, p. 241, Add. Rec.), and Geary that the *Mangrove* stopped a few minutes, but does not think *Panama* stopped at all (Q. 1, p. 241, Add. Rec.), and both say it was the *Indiana* that captured the *Panama*. (Q. 7, p. 242, Add. Rec.) Their inexperience, misstatements and inaccuracies make valueless their opinions that signals could have been read and their statements that they

made out the *Panama's* flag 5 minutes before the *Mangrove's* boat went over.

14. GOLDEN.—Made out the Spanish flag with a long glass (Q. 4, p. 246, and Q. 12, p. 247, Add. Rec), but gives the size of the signal flags only at 4 x 3 feet and 3½ x 2½ to 2½ feet. (Q. 6, pp. 248, 249, Add. Rec.) Considers were in signal distance, because he could make out *Panama's* flag. (Q. 12, p. 247, Add. Rec.) Saw the smoke of two shots. (Q. 6, p. 246, Add. Rec.) Saw a boat, a whale-boat. (QQ. 8, 9, p. 247, Add. Rec.) Saw an officer, a coxswain and crew in the boat. (Q. 4, p. 248, Add. Rec.) *Panama* dropped her flag and hoisted it again at the time the *Mangrove* lowered a boat after the firing (Q. 8, p. 247, Add. Rec.), yet no one else among all the witnesses claims that the flag was lowered at that time. Captain Everett says it was not lowered. (Q. 30, p. 109, Add. Rec.) Golden's statement that he made out the Spanish flag is destroyed by his three distinct misstatements, all of which could not have been honest errors. 1st. That he was familiar with signals and that of the two sizes 4 x 3 was the larger. 2d. That there were in the boat an officer (who would sit in one end), a coxswain (who would sit in the other end) and a crew (who would sit in the middle); and 3d. That the *Panama* dropped her flag and lowered it again.

15. KIMBALL.—Acquaintance with flag signals is evidently very limited. (Pp. 252, 253, Add. Rec.) Flag signals could undoubtedly have been read. (P. 253, Add. Rec.) *Indiana* fired three shots. (P. 252, Add. Rec.) Saw boat, but did not know that he could say what kind of a boat it was. (P. 252, Add. Rec.) Boat was 28 or 30 feet long, maybe, and had 8 or 10 people, or one or two more people in it. (Near bottom of page 253, Add. Rec.)

16. MAYBAUM.—Experience with signals also very limited. (Pp. 256, 257, Add. Rec.) Could have read signals with the aid of glass. (P. 255, Add. Rec.) Saw

smoke from *Mangrove's* guns. (P. 255, Add. Rec.) Saw boat, about 15 feet long, in which there appeared to be 5 persons. (P. 257, Add. Rec.)

17. BURNS.—A signal boy. From his testimony signal boys about the only persons responsible for signals, or understanding signalling (p. 261, Add. Rec.); saw flash of guns, and boat (p. 258, Add. Rec.); could read signals 5 miles and see boat 5 miles (p. 261, Add. Rec.); signals on the *Mangrove* could have been read with binoculars.

18. MEEHAN.—Pretty sure *Mangrove* fired, but had n't got it certain; would like to swear to it, though, if he could; saw no effort of *Mangrove* to communicate with *Panama*; when *Mangrove* fired *Panama* went straight ahead and did not heave to until *Indiana* fired; saw boat in water, but did not know whether it was coming to the *Indiana* or *Panama*. Nevertheless, states when boat went from the *Mangrove* signals could have been read from *Indiana*, and knows it, because he saw the *Mangrove* hoist signals; but he could not read them, did not understand them. (Pp. 264, 265, Add. Rec.)

19. COLONEL WALLER.—Knows of signals having been read 8 miles; that is very close measurement; at that distance signals would have been distinct after a few moments, while another signal at that distance could not be made out at closer range. (QQ. 41–45, p. 269, Add. Rec.) Thinks that before gun was fired we could have read signals, certainly afterwards. That is, the ordinary expert man could do it (Q. 13, p. 267, Add. Rec.), and even hazards the opinion that an expert could have read boat flags. (Q. 40, p. 269, Add. Rec.) Considers that the *Indiana* was only 3½ to 4 miles away when the *Mangrove* and *Panama* stopped (Q. 9, p. 266, Add. Rec.), yet the distance the *Indiana* travelled after the capture, even at the slow speed this witness gives her, of 7 knots an hour, plus the distance at which he fired the gun, would

account for over 7 knots between the vessels at the time of capture, without counting the distance *Mangrove* travelled.

Following is Evidence *Contra:*

1. Two ships' towers only visible. (Q. 3, p. 7, Rec. Burgas on *Panama.*)

2. Believes *Indiana* and another ship in sight; duties demanded presence below and not prepared to state positively time we sighted the other ships. (Q. 3, p. 10, Rec. Thompson on *Panama.*)

3. Two ships in sight. (Q. 3, p. 14, Rec. Quevedo on *Panama.*)

4. No vessel in signal distance. (Q. 4, p. 22, Rec. Olssen, witness for appellee.)

5. There was no vessel in signal distance. (Q. 4, p. 23, Rec. Chipchase, for appellee.)

6. No vessel in signal distance. (Q. 4, p. 24, Rec. Ralston, for appellee.)

7. No vessel in signal distance. (Q. 4, p. 25, Rec.; qq. 24–27, pp. 184–5; q. 44, p. 186; q. 58, p. 187, Add. Rec. John Peterson, for appellee.)

8. No vessel in signal distance. (Q. 4, p. 26, Rec.; qq. 26–32, pp. 162–3; qq. 1, 6, p. 164; qq. 12–16, p. 165, Add. Rec. Hanson, for appellee.)

9. No vessel in signal distance. (Q. 4, p. 27, Rec. Clinton, for appellee.)

10. No vessel in signal distance. (QQ. 3, 4, p. 29, Rec.; qq. 16–18, p. 138; qq. 24–25, p. 139, Add. Rec. Dayton, for appellee.)

11. No vessel in signal distance. (Q. 4, p. 30, Rec. Schmitt, for appellee.)

12. No vessel in signal distance. (Q. 4, p. 31, Rec.; qq. 9–11, pp. 107–8, qq. 111–3, p. 117; q. 146, p. 120, Add. Rec. Everett, for appellee.)

13. No vessel in signal distance. (Q. 4, p. 33, Rec.; q. 3, pp. 122–3; qq. 9, 11, p. 124, Add. Rec. Palmer, for appellee.)

14. No vessel in signal distance. (Q. 4, p. 34, Rec.; q. 7, p. 172; qq. 52–57, pp. 176–7; qq. 68–72, pp. 177–8; qq. 4–13, pp. 178–9; qq. 12–23, p. 179, Add. Rec. Cosgrove, for appellee.)

15. No vessel in signal distance. (QQ. 22–26, p. 149; qq. 16–22, pp. 152–3, Add. Rec. Chase for appellee.)

16. No vessel in signal distance. (Q. 6, p. 153; qq. 41–43, p. 155; qq. 8–9, p. 156, Add. Rec. Overn, for appellee.)

17. No vessel in signal distance. (QQ. 27–32, p. 159; qq. 5–8, p. 160, Add. Rec. Charles Peterson, for appellee.)

In view of the distance between the vessels, of the failure of the *Indiana* to make any effort to signal the *Mangrove* or inability to make out the colors of the *Panama* and of the utter absence of any testimony to show what was signal distance for the boat-flags with which only the *Mangrove* could have signalled, we deem it unnecessary to discuss the many inconsistencies and conflicting statements among claimants' own witnesses, or contradictions of claimants' witwitnesses by witnesses for the appellee, such for instance as where the chaplain of the *Indiana* attributes to the captain of the *Mangrove* a deliberate refusal to look in the direction of the *Indiana* and alleges that the captain's eyesight was bad and he could not read compass bearings. Testimony relative to the chaplain's accusations may be found as follows:

Q. 41, p. 110; Q. 124, p. 118; Q. 3, p. 122; Q. 11, p. 124; Q. 27, p. 132; QQ. 34–38, p. 133, Add Rec.

Testimony relative to the captain's eyesight may be found as follows:

Pp. 44, 45, 51, 52, 143, Add Rec.

Testimony relative to the captain's inability to read compass bearings may be found as follows:

Q. 38, p. 110; QQ. 127–129, pp. 118–119; p. 123, Add Rec.

When witnesses for appellant put the *Indiana* within from 4 to 5 or 6 miles of the *Mangrove* at the time of the capture, in view of the very positive evidence of her true distance away they discredit the value of their opinions as much as those other witnesses discredit their memories when they say that they saw three port guns fire, or saw signals hoisted on the *Mangrove* when no such signals ever were hoisted; or saw 5 or 6, or 8 or 10 people in the boat.

Flag of *Panama*.

The *Panama's* flag contained the two colors most easily distinguished among the navy signal colors, red and yellow. To explain why the *Indiana*, when the flagship inquired the colors of the stranger, did not signal the *Mangrove*, Admiral Taylor, admitting that even when going to see he could have signalled without stopping, gave in one sentence three distinct reasons, which we will number: (1) "Signalling at this distance when you come near to the limit is always slow; it takes time to make out signals at that distance when you come near the limit; and (2) twilight was approaching; it was nearly sundown, as I remember; and (3) it was only natural that there should be no attempt at signalling when the vessel was approaching." (P. 69, Add. Rec.)

Of these reasons, as we interpret them, the first seems to be, that at that time and distance signalling would have been difficult. The second, that "twilight was approaching" and there was no time for experimenting. The third is, that signalling was unnecessary, because the "vessel

was approaching"; yet, as the facts show, it was deemed necessary to go at the "greatest possible speed" to see.

It would have been according to the custom of the naval service for the *Indiana*, when she could not make out the *Panama*, to have inquired of the *Mangrove*, had the *Mangrove* been considered at the time within signal distance. (See QQ. 51–54, pp. 141, 142, Add. Rec.; QQ. 51, 52, p. 129, Add. Rec.)

You are asked to assume that the *Indiana* could have read signal flags on the *Mangrove* at a time when neither the man Munson, sent up aloft to report, nor any of the officers upon the bridge with glasses could make out the colors in the Spanish flag flying from the *Panama*. The probative force of the fact that those whose duty it was to see and to signal could not see, would not be essentially weakened by proof that three others in that ship of five hundred people had really seen the colors of the *Panama*. The effort however to prove that this was the case, by Golden, Lee and Geary, has failed. They were on the deck, which is below the bridge, made no report then, or so far as the evidence shows, since, till their claim for prize money was endangered, and then accompanied their evidence on this point with other statements which, as we have pointed out, were palpably untrue. So their testimony must be set aside.

Inability to make out the flag is attempted to be explained by a generality as to the condition of brightness in which merchant vessels usually keep their flags, and Admiral Taylor thinks, from his recollection of the *Mangrove*, that her signal flags would have been hoisted higher than a flag would have been on the *Panama*. (Just below middle of page 62, Add. Rec.) The estimate of Captain Everett, who made no particular examination (Q. 140, p. 119, Add. Rec.), is that the Spanish flag was not over half the size of the large signal flags in use. Half of the

surface of an 8 x 11 flag is 44 feet as against 12 feet for the *Mangrove's* flags. The testimony, by an officer who examined this particular merchant flag, is that it was about 12 feet long and in good condition, while the signal flags the *Mangrove* carried were only about 4 feet long; and that the Spanish flag was hoisted at the mizzen gaff, at a height equal to if not higher than would have been even the topmost of the three signal flags, which in signalling would have been one above the other, if they had been hoisted on the *Mangrove* (QQ. 34–39, p. 140; QQ. 26–27, p. 125; QQ. 45–49, pp. 128–129, Add. Rec.)

We think it fairly inferable from all the evidence that though the *Indiana* before and after the capture was approaching the *Panama*, and for the express purpose of finding out what vessel she was, she never made out that she carried a Spanish flag until just about the time the shot from the *Indiana* was fired. Whether the discovery of the Spanish flag was the prime, or only a secondary, cause of the order to fire, at 6.45, is quite immaterial. If the discovery was only a contributing cause, as we admit on Admiral Taylor's statement, the inference still is, as the other evidence indicates, that the discovery had just been made; and that is our point.

The evidence bearing on this point is to be found as follows: Q. 9, p. 4, and QQ. 347, 348, p. 40, Add. Rec.—Captain Dawson. At the bottom of page 61, Add. Rec.; near bottom of page 70—Admiral Taylor. QQ. 16–18, p. 124, Add. Rec.—Ensign Palmer. QQ. 44–48, pp. 140, 141, Add. Rec.—Lieutenant Dayton.

The Attorney-General's Brief.

The Government's brief has reached us since the printing of the first portion of our argument. Its first proposition is, the *Mangrove* was superior in force to the *Panama*.

The brief notes that six officers testified to the superiority of the *Mangrove*, several of them since the decision of the court below declaring emphatically that the *Panama* was the superior, and also that the Prize Commission so decided; but it is argued that notwithstanding all this concurring testimony the decision of the court below on this question of fact should be reversed, because "the surrounding facts are the essential part of the problem." Some of these facts are, that the *Panama* was a 12-knot ship and the *Mangrove* an 8-knot vessel, and the *Panama* could easily have escaped. (Dayton, Q. 80, p. 144, Add. Rec.) Also that the *Panama* was a very much larger vessel, from which it would appear that she could, by her superior weight and speed, have easily run down the *Mangrove*.

Reference is made to the original case of the *Panama* before this court, 176 U. S. 535. We also rely on that case, from which it appears that the *Panama* was a part of the Spanish naval reserve, just as the *St. Paul* and other vessels are of ours, the material difference being this: Our naval reserve vessels are not required to carry any specific armament. The *Panama* was, and she carried, not a merchant, but a man-of-war flag (Q. 3, p. 146, Add. Rec.). It was her armament, specified by the Spanish Government, that made her superior to the *Mangrove*. This court, p. 539, citing the contract between Spain and the owners of the *Panama*, says:

"By Article 35, the vessels, with their engines, armament and other appurtenances, must be constantly maintained in good condition for service.

"By Article 41, the officers and crew of the vessels, and as far as possible the engineers, shall be Spaniards."

Engineers in the Spanish naval service are frequently foreigners, because of the difficulty of procuring competent engineers in Spain, so that these two articles place

assimilated *pro tanto*, vessels of the Spanish regular navy and of their reserve navy. The requirement that the crew shall be Spaniards and that they shall carry a specified armament, in good condition, can only mean that these Spaniards shall use this armament when occasion demands. The Spanish Government in making this contract could not have contemplated that a vessel belonging to their reserve navy should surrender to an inferior force of an enemy in time of war without resistance.

In the same opinion, p. 546, this court says, when considering the case of this armed vessel:

"Yet it must be admitted that arms and ammunition are not contraband of war when taken and kept on board a merchant vessel as a part of her equipment and solely for her defense against 'enemies, pirates and assailing thieves,' according to the ancient phrase still retained in policies of marine insurance."

After fully discussing this point, which had been raised, by the plaintiffs, the court, on p. 549, near the conclusion of its opinion, says:

"She was, then, enemy property, bound for an enemy port, carrying an armament susceptible of use for hostile purposes and herself liable, upon arrival at that port, to be appropriated by the enemy to such purposes."

If she had such armament, susceptible of use for hostile purposes, and a crew of Spaniards who were presumptively familiar with and able to use this armament, it is not easy to see how the Government can profit now by this decision.

We refer back to our brief, under the head of "Relative Force," pp. 2–6, inclusive, for a discussion in part of other points made in the Government's brief.

The English cases cited by the Government show that the English rule was to allow ships to share not only on

the idea of associated effort but also of constructive assistance. The three progressive changes made by our statutes, as shown in the following citation of the Government's brief, seem to us to indicate in the clearest possible manner the intention of Congress to change the English rules and to fix a definite and rigid statutory rule from which we can not see how our courts could conceive themselves at liberty to depart.

"The phrase of the act of 1800 (par. VII, section 6, act April 23, 1800, 2 Stat. 45, 53) was 'in sight;' that of the act of 1862 was 'within signal distance' (act July 17, 1862, 12 Stat. 606, sec. 3, par. 4); that of the present law (act June 30, 1864, sec. 4632, R. S.) is 'within signal distance * * * under such circumstances and in such condition as to be able to render effective aid if required.'"

To share with the *Mangrove*, which is in this case admittedly the captor, under the statute of 1800, it would have been sufficient for the *Indiana* to be "in sight." Under the act of 1862 she must have been "within signal distance." Some of the decisions quoted by the Government indicated a disposition to hark back to the English rule of constructive assistance, and therefore the act of 1864 provided more definitely still that in order to share the *Indiana* must have been "within signal distance under such circumstances and in such condition as to be able to render effective aid if required." The words "if required" are important. No fair construction of this statute could allow the court in this instance to infer from the fact that the officers of the prize testified that two other warships were "in sight" at the time of the surrender to the *Mangrove*, that the prize therefore was intimidated into a surrender, and hence that the *Indiana* was a joint captor. There is no evidence whatever *of the fact which such a construction of the testimony assumes.* The court below decided against this construction of the evidence and found as

a fact that the *Mangrove* was the sole captor. For the appellate court to reverse this decision now on such a ground would be a reversal without the convincing evidence which this court always requires of an appellant. It would also be a setting aside of the act of 1864. To make this clear, let us suppose that the *Mangrove* could have signalled and had signalled for assistance; that the *Indiana* being out of range had replied, "Can not come because aground"; and that thereupon, after a desperate battle the *Mangrove* had conquered and captured the *Panama*. Evidently the *Indiana* would not share, because she was not "in such condition as to be able to render effective aid *if required*."

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